DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-815
Title: Sprint Communications, Inc., Petitioner
v.
Elizabeth S. Jacobs, et al.
Docketed: January 4, 2013
Linked with 12A499
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (11-2984)
Decision Date: September 4, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 14 2012	Application (12A499) to extend the time to file a petition for a writ of certiorari from December 3, 2012 to January 17, 2013, submitted to Justice Alito.
Nov 19 2012	Application (12A499) granted by Justice Alito extending the time to file until January 2, 2013.
Jan 2 2013	Petition for a writ of certiorari filed. (Response due February 4, 2013)
Jan 2 2013	Appendix of Sprint Communications Company, L.P. filed.
Jan 24 2013	Order extending time to file response to petition to and including March 6, 2013.
Mar 6 2013	Brief of respondents Elizabeth S. Jacobs, et al. in opposition filed.
Mar 19 2013	Reply of petitioner Sprint Communications Company, L.P. filed.
Mar 20 2013	DISTRIBUTED for Conference of April 12, 2013.
Apr 15 2013	Petition GRANTED.
Apr 30 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 28, 2013.
Apr 30 2013	The time to file respondents' brief on the merits is extended to and including August 27, 2013.
Jun 25 2013	Blanket consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner and counsel for the respondents.
Jun 28 2013	Joint appendix filed. (Statement of costs filed.)
Jun 28 2013	Brief of petitioner Sprint Communications Company, L.P. filed.
Jul 3 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jul 5 2013	Brief amicus curiae of CTIA - The Wireless Association filed.
Jul 5 2013	Brief amici curiae of Law Professors filed.

Jul 31 2013	Updated Rule 29.6 disclosure received from counsel for the petitioner. (Distributed)
Aug 19 2013	CIRCULATED.
Aug 20 2013	SET FOR ARGUMENT on Tuesday, November 5, 2013.
Aug 27 2013	Brief of respondents Elizabeth S. Jacobs, et al. filed. (Distributed)
Sep 3 2013	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Sep 3 2013	Brief amici curiae of Michigan and 21 Other States filed. (Distributed)
Sep 3 2013	Brief amicus curiae of Iowa Office of Consumer Advocate filed. (Distributed)
Sep 13 2013	Proposal of counsel for respondents to lodge copies of the "Complaint and Request For Emergency Relief" filed with the Iowa Utilities Board.
Sep 13 2013	Record received from U.S.C.A. for 8th Circuit. (1 box)
Sep 13 2013	Record from U.S.D.C. for Southern District of Iowa is electronic.
Sep 26 2013	Reply of petitioner Sprint Communications Company, Inc. filed. (Distributed)
Oct 4 2013	Joint supplemental brief filed. (Distributed)
Nov 5 2013	Argued. For petitioner: Timothy J. Simeone, Washington, D. C. For respondents: David J. Lynch, Des Moines, Iowa.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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JANUARY 2, 2013

QUESTION PRESENTED

Whether the Eighth Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is, instead, "remedial."

PARTIES TO THE PROCEEDING

Petitioner Sprint Communications Company, L.P., was the appellant in the proceeding below. Respondents Elizabeth S. Jacobs, Darrell Hanson, and Swati A. Dandekar, sued in their official capacities as members of the Iowa Utilities Board ("IUB"), were the appellees.

CORPORATE DISCLOSURE STATEMENT

Sprint Communications Company, L.P., ("Sprint") is a limited partnership organized under Delaware law that primarily provides telecommunications services to the public. Sprint's partners include U.S. Telecom, Inc., Utelcom, Inc., UCOM, Inc., and Sprint International Communications Corporation—all of which are direct or indirect wholly owned subsidiaries of Sprint Nextel Corporation. Sprint Nextel Corporation is the publicly traded company resulting from the merger of Sprint Corporation and Nextel Communications, Inc., which was consummated on August 12, 2005. Sprint Nextel is a publicly traded corporation with no parent company. No other public company owns 10 percent or more of Sprint Nextel's stock.

TABLE OF CONTENTS

Page

Petition

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

OVERVIEW 2

STATEMENT 6

A. Statutory and Regulatory Background 7

B. Procedural Background 10

REASONS FOR GRANTING THE PETITION 14

I. The Court Should Grant Certiorari to Resolve the Circuit Split over the Scope of *Younger* Abstention 15

A. The Eighth Circuit Has Split With Nine Other Circuits in Rejecting the Coercive/Remedial Distinction 15

B. The Roots of the Circuit Split Are Deep and Thus Unlikely to Be Resolved Without Intervention by this Court 20

II. The Decision Below is Inconsistent with this Court's Jurisprudence Establishing the Primacy of the Federal Judiciary in Deciding Questions of Federal Law 23

III. The Decision Below is Inconsistent with this Court's Abstention Cases and Will Result in Further Confusion of Abstention Law in the Eighth Circuit and Beyond 26

A. The Purposes of Abstention Doctrine Do Not Apply Here 27

B. The Eighth Circuit's Rule Ignores the Remedial/Coercive Line Drawn by this Court's Precedents 30

C. The Eighth Circuit's Decision Improperly Conflates *Burford* and *Younger* Abstention 33

CONCLUSION 36

Materials in the Appendix

Appendix A (*Sprint Communications Co., L.P., v. Jacobs*, U.S. Court of Appeals for the Eighth Circuit Opinion, Filed Sep. 4, 2012) 1a

Appendix B (U.S. District Court for the Southern District of Iowa Order, Filed Aug. 1, 2011) 11a

Appendix C (Iowa Utilities Board Order, Issued March 25, 2011) 28a

Appendix D (Iowa Utilities Board Order, Issued Feb. 4, 2011) 60a

Appendix E (Relevant Portions of the United States Code) 159a

TABLE OF AUTHORITIES

Page

Cases

Alleghany Corp. v. Haase, 896 F.2d 1046 (7th Cir. 1990) (Posner, J.), *vacated as moot sub nom. Dillon v. Alleghany Corp.*, 499 U.S. 933 (1991) 20-21, 22

Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990) 11, 20-22

Alleghany Corp. v. Pomeroy, 898 F.2d 1314 (8th Cir. 1990) 21

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 5

Brown ex rel. Brown v. Day, 555 F.3d 882 (10th Cir. 2009) 3, 4, 16, 18-19

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 6, 28

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 5, 12, 23-24, 31

Devlin v. Kalm, 594 F.3d 893 (6th Cir. 2010) 16

England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) 2, 5, 14-15, 23

Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops, Inc., 48 F.3d 294 (8th Cir. 1995) 23-24

Green v. City of Tucson, 255 F.3d 1086, *limited on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) 17

Guillemard-Ginorio v. Contreras-Gómez, 585 F.3d 508 (1st Cir. 2009) 16

GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000) 34-35

Hinrichs v. Whitburn, 975 F.2d 1329 (7th Cir. 1992) 21

Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011) 4, 13, 17-18

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 3, 29, 31

Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc., 551 F.3d 587 (7th Cir. 2008) 13

Juidice v. Vail, 430 U.S. 327 (1977) 29-30

Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156 (4th Cir. 2008) 17

Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25 (1959) 24

Majors v. Engelbrecht, 149 F.3d 709 (7th Cir. 1998) 16

Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 29

Minnesota PUC v. FCC, 483 F.3d 570 (8th Cir. 2007) 9

Moore v. City of Asheville, 396 F.3d 385 (4th Cir. 2005) 16-17

Moore v. Sims, 442 U.S. 415 (1979) 29, 31

Nader v. Keith, 385 F.3d 729
(7th Cir. 2004) 3, 15-16

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 8

New Orleans Pub. Serv. Inc. v. City of New Orleans, 798 F.2d 858, 861-62 (5th Cir. 1986) 28

New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans,
491 U.S. 350 (1989) 6, 28, 31, 33-35

Night Clubs, Inc. v. City of Fort Smith,
163 F.3d 475 (8th Cir. 1998) 11, 22

Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986)..... 15, 32

O'Neill v. City of Philadelphia,
32 F.3d 785 (3d Cir. 1994)..... 16, 32

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) 32

Pennzoil Company v. Texaco, Inc.,
481 U.S. 1 (1987) 22, 30, 31

Philip Morris, Inc. v. Blumenthal,
123 F.3d 103 (2d Cir. 1997)..... 16

Railroad Comm'n of Texas v. Pullman,
312 U.S. 496 (1941) 27

Thomas v. Texas State Bd. of Med. Exam'rs,
807 F.2d 453 (5th Cir. 1987) 11

Trainor v. Hernandez, 431 U.S. 434 (1977)..... 29, 31

Univ. Club v. City of New York,
842 F.2d 37 (2d Cir. 1988) 16

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002) 5, 15, 25-26

Vonage Holdings Corp. v. Minnesota PUC,
290 F. Supp. 2d 993 (D. Minn. 2003) 9

Willcox v. Consolidated Gas Co.,
212 U.S. 19 (1909) 24

Wexler v. Lepore, 385 F.3d 1336
(11th Cir. 2004) 17

Woollard v. Sheridan, No. 10-2068,
2010 WL 5463109 (D. Md. Dec. 29, 2010) 17

Wyatt v. Keating, 130 Fed. Appx. 511
(3d Cir. 2005) 16

Younger v. Harris, 401 U.S. 37 (1971) 2, 3, 28-29

Zablocki v. Redhail, 434 U.S. 374 (1978) 34-35

Statutes and Other Legislative Authorities

28 U.S.C. § 1254(1)2 2

28 U.S.C. § 1291 12

28 U.S.C. § 1331 10

28 U.S.C. § 1332 10

28 U.S.C. § 1651 10

28 U.S.C. § 2201 10

28 U.S.C. § 2202 10

47 U.S.C. § 153(24) 7-8

47 U.S.C. § 153(53) 7-8

47 U.S.C. §§ 201-276 8

47 C.F.R. § 64.702 2

Other Authorities

Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 4241 (3d ed.) 29-30

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commc'ns Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905 (1996) 8

Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecomms. nor a Telecomms. Serv., 19 FCC Rcd. 3307 (2004) 9

Vonage Holdings Corp. Petition for Declaratory Ruling re an Order of the Minnesota PUC, Memorandum Op. and Order, 19 FCC Rcd. 22,404 (2004) 9

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Sprint Communications Company, L.P., respectfully petitions for review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (Pet. App. 1a-10a) is reported at 690 F.3d 864 (8th Cir. 2012). The decision of the United States District Court for the Southern District of Iowa, Central Division, is reprinted at Pet. App. 11a-27a. The decision of the Iowa Utilities Board (Pet. App. 60a-158a) is available at 2011 WL 459686, and the Board's order denying reconsideration (Pet. App. 28a-59a) is available at 2011 WL 1148175.

JURISDICTION

The judgment below was entered on September 4, 2012. A 30-day extension for filing this petition was granted on November 19, 2012, making the deadline January 2, 2013. *See* Application No. 12A499. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of the following relevant provisions are reprinted in the Appendix at Pet. App. 159a-162a: 47 U.S.C. §§ 152, 153; 47 C.F.R. § 64.702.

OVERVIEW

The Eighth Circuit's decision below: 1) creates a stark split in the circuits in the application of federal abstention doctrine under *Younger v. Harris*, 401 U.S. 37 (1971); and 2) also represents a sharp departure from this Court's jurisprudence establishing the "primacy of the federal judiciary in deciding questions of federal law." *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-16 (1964). The practical effects of the ruling

below are dramatic—cases involving issues of federal law that routinely go forward in federal district court in other circuits may now be heard only by the state courts in the Eighth Circuit.

The basic purpose of *Younger* abstention is to ensure that the States may try criminal cases free from federal judicial interference with their legitimate enforcement interests. *See* 401 U.S. at 43-44. Although this Court has extended *Younger* to protect certain state civil-enforcement proceedings "akin to a criminal prosecution," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), the point of *Younger* abstention has remained unchanged: "[I]f a person is believed to have violated a state law, the state has instituted a criminal, disciplinary, or other enforcement proceeding against him, and he has a federal defense, he cannot scurry to federal court and plead that defense as a basis for enjoining the state proceeding." *Nader v. Keith*, 385 F.3d 729, 732 (7th Cir. 2004). Because *Younger* protects the States' *enforcement* interests, a key requirement for *Younger* abstention is that the state proceeding must be a criminal, disciplinary, or similar civil-enforcement proceeding—or as some courts have summed up that requirement, the proceeding must be "coercive" rather than "remedial." *See, e.g., Brown ex rel. Brown v. Day*, 555 F.3d 882, 889 (10th Cir. 2009) (adopting the First Circuit's test for whether a state proceeding is remedial or coercive).

But the Eighth Circuit has now rejected that core principle of *Younger*, and requires abstention in cases—like this one—involving *no* coercive or enforcement action by the State. The result is a direct conflict in the circuits. The Eighth Circuit

staked out its position in two cases. The first, *Hudson v. Campbell*, 663 F.3d 985 (8th Cir. 2011), was decided after briefing but before argument in the present case. The *Hudson* court acknowledged that other circuits find the coercive/remedial distinction "outcome determinative" under *Younger*, but nonetheless rejected it—yet at the same time, *Hudson* left open the possibility that abstention might not apply in remedial cases involving a "pervasive federal regulatory scheme." 663 F.3d at 988. Below, the Eighth Circuit reaffirmed *Hudson* and also found that it makes no difference that this case does involve a "pervasive federal regulatory scheme." Pet. App. 7a. In short, the Eighth Circuit has now interpreted *Younger* abstention to apply to essentially *all* state agency cases, even those dominated by issues of federal law and policy.[1]

Under the coercive/remedial test, there plainly would be no abstention in this case. As the Tenth Circuit explained in *Brown v. Day*, cases that are "coercive" for purposes of *Younger* "originate[] with the state's proactive enforcement of its laws," and the "federal plaintiff . . . [seeks] to block [state] proceedings that would ultimately impose punishment" on it. 555 F.3d at 892. This case involves absolutely nothing of the sort, but rather arises from a commercial dispute between Sprint and Iowa Telecom (now Windstream) about "access charges," which are fees that telephone companies whose customers make calls sometimes must pay to telephone companies whose customers receive the calls.

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[1] No petition for certiorari was filed in *Hudson*.

The Eighth Circuit's denial of Sprint's right to federal court review of its federal-law claim also conflicts with this Court's jurisprudence regarding district courts' "virtually unflagging obligation" to decide cases subject to their jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Specifically, in *England*, this Court explained that "[a]bstention is a judge-fashioned vehicle for according appropriate deference to . . . the role of state courts as the final expositors of state law." 375 U.S. at 415. Again, Sprint's filing in district court unquestionably involved *no* issues of state law—Sprint sought federal court review of complex issues of federal telecommunications law arising under the Telecommunications Act of 1996 ("1996 Act" or "Act"). And this Court has repeatedly found that, under the 1996 Act, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1999). Indeed, under the 1996 Act, state telecommunications regulators act as "deputized federal regulators," so the federal courts routinely hear appeals of the telecommunications-related decisions of state public utilities commissions. This Court expressly approved this federal review process in *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002).

Finally, the decision below is fundamentally inconsistent with this Court's nuanced abstention jurisprudence. As noted above, this Court has made clear that *Younger* applies to "coercive" and "enforcement" cases. But this Court *also* has an abstention doctrine designed to protect important state interests in non-coercive state administrative

cases like this one. Specifically, *Burford* abstention—originating in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)—prevents federal court "intru[sion] into state proceedings where there exists a complex state regulatory system." *New Orleans Pub. Serv. Inc. v. City of New Orleans*, 491 U.S. 350, 361 (1989) (internal citations omitted). The Eighth Circuit's rejection of the coercive/remedial distinction collapses and conflates the *Younger* and *Burford* doctrines, opening the door to further mischief in both district courts and the courts of appeals.

This Court should grant certiorari to bring the law of the Eighth Circuit into line with that of this Court and other circuits, and to prevent further confusion—in the Eighth Circuit and elsewhere—about this Court's related but separate abstention doctrines.

STATEMENT

This petition arises from a dispute between Sprint and Iowa Telecom (now Windstream) over "access charges," a kind of "intercarrier compensation" or payment made between telephone companies. Carriers whose customers make (or "originate") calls are sometimes required to pay access charges to the carriers that deliver (or "terminate") those calls to their customers. The statutory and regulatory landscape relevant to access charges requires some explanation here.

A. Statutory and Regulatory Background.

Access charges may be either intrastate or interstate, depending on whether the call traverses state lines. Traditionally—*i.e.*, for calls made over the Public Switched Telephone Network ("PSTN")—this distinction between "intrastate" and "interstate" calls dictated whether federal or state regulators had authority to regulate a call. State regulators regulated intrastate calls, while federal regulators regulated interstate calls.

This case, however, concerns "Voice over Internet Protocol" ("VoIP") calls rather than traditional telephone calls. The particular VoIP calls at issue here originated on the cable broadband network of a cable company with which Sprint had a business arrangement. During the initial Internet leg of a VoIP call, the caller's voice is translated into digital packets and routed over an Internet protocol ("IP") network. Subsequently, those packets are transformed by Sprint into a traditional telephone signal, which may be terminated over the PSTN by a telephone company (like Windstream) serving the called party.

For such VoIP calls, the question whether access charges apply is closely connected to the question of which regulators have authority to regulate the calls. Under the Telecommunications Act of 1996 ("1996 Act" or the "Act"), authority to regulate no longer turns on whether calls are "interstate" or "intrastate." Instead, the issue is whether VoIP is an "information service" under the 1996 Act, 47 U.S.C. §

153(24) (formerly known as an "enhanced service"[2]), or is alternatively a "telecommunications service," *id.* at § 153(53). Pet. App. 161a. Federal law—administered by the FCC—requires information services to remain largely unregulated,[3] while telecommunications services remain subject to joint regulation by state and federal regulators.[4]

The question of what makes an offering an "information service" under the 1996 Act is a difficult one that has perplexed the FCC and the federal courts since the passage of the Act. Nevertheless, the FCC has proposed general guidelines for distinguishing information services, including that a service may be an "information service" if it "enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol" (known as "net protocol conversion").[5]

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[2] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005).

[3] *See* Pet. App. 162a.

[4] *Brand X Internet Servs.*, 545 U.S. at 975 ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers."); 47 U.S.C. §§ 201-276 (regulating common carriers); Pet. App. 159a (state authority).

[5] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commc'ns Act of 1934, As Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905, 21,956-57 ¶¶ 104, 106 (1996).

As noted above, the VoIP calls at issue in this case are made by end users with cable broadband Internet access. These calls are initially carried over packet-switched networks, but are later converted to traditional telephone signals and handed off by Sprint to local exchange carriers like Windstream for termination. Sprint initially paid access charges for these calls, but ultimately concluded that it was not required to do so. Sprint's position is that these calls represent an information service because they enter the network in one protocol and exit the network in a different protocol, thus undergoing net protocol conversion.[6] As explained above, federal law requires "information services" to remain largely unregulated by the States, so only the FCC—and not state

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[6] *Cf. Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecomms. nor a Telecomms. Serv.*, 19 FCC Rcd. 3307, 3314 ¶11 (2004) (finding that Pulver's Free World Dialup VoIP service was an information service); *Vonage Holdings Corp. v. Minnesota PUC*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (finding that Vonage's VoIP is an information service and that Congress has "occup[ied] the field of regulation of information services," so Minnesota could not impose telecommunications regulation on VoIP). The FCC subsequently preempted the Minnesota PUC's efforts to regulate Vonage on alternate grounds, and that order was affirmed by the Eighth Circuit (without addressing the views of the *Vonage* district court). *See Vonage Holdings Corp. Petition for Declaratory Ruling re an Order of the Minnesota Pub. Utils. Comm'n*, Memorandum Op. and Order, 19 FCC Rcd. 22,404 (2004); *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 574-76 (8th Cir. 2007).

regulatory commissions--could decide to impose access charges on these calls. Because the FCC had not done so, Sprint concluded that the calls at issue were not subject to access charges.

B. Procedural Background.

Upon concluding that the VoIP calls at issue here are an information service not subject to access charges, Sprint began disputing access charges assessed by Windstream for such calls and also withholding payment. In response, Windstream threatened to disconnect Sprint's service and effectively block calls to and from Sprint's customers. On January 6, 2010, Sprint filed a complaint with the IUB seeking a declaration that, under the terms of Windstream's tariff, it was proper for Sprint to dispute Windstream's imposition of access charges for terminating VoIP calls and to withhold disputed amounts. J.A.4 ¶15. Sprint did *not* ask the IUB to resolve the underlying question whether VoIP calls may properly be subjected to intrastate access charges, *id.* at 4 ¶16, but rather maintained that issue is a fundamental question of *federal* law and policy that only the FCC may answer. The IUB disagreed, issuing a 50-page analysis both claiming authority to decide the issue and concluding that federal law *does* permit imposing access charges on VoIP calls.

Sprint then filed a complaint in federal district court arguing that the IUB lacked authority to determine whether access charges apply to VoIP traffic. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1651, 2201, and 2202. But Sprint's counsel determined that prudence *also* required petitioning for review of the IUB order in

Iowa District Court. The state-court filing was necessary because: 1) existing Eighth Circuit law already appeared to understand *Younger* abstention extremely broadly, *see, e.g. Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475, 481 (8th Cir. 1998), so counsel recognized the danger that the federal district court might decline to hear Sprint's appeal; and 2) the Eighth Circuit had held—contrary to the Fifth Circuit—that "a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies," *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1144 (8th Cir. 1990); *cf. Thomas v. Texas State Bd. of Med. Exam'rs*, 807 F.2d 453, 456 (5th Cir. 1987) ("mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of *Huffman*"). Taken together, these rules raised the risk that Sprint would be barred from federal court *after* the time for appeal to state court had run. Sprint therefore filed for review in state court shortly after filing its federal complaint. In its state-court filing, Sprint appealed both state-law (tariff) issues and the federal-law issues on which the IUB primarily focused. To allow the federal case addressing the central issue in Sprint's dispute with Windstream to go forward without the risk of duplicative proceedings, however, Sprint filed a motion to stay the state case pending resolution of the federal case.

In district court, the IUB moved for abstention under *Younger v. Harris*, seeking to capitalize on the Eighth Circuit's broad understanding of the doctrine. Sprint opposed, arguing that *Younger*, like all abstention doctrines, is fundamentally about protecting a state's ability to administer, interpret,

and enforce its *own* laws—and that this case has nothing to do with any of those things. Rather, Sprint argued, this case is about Sprint's basic right to obtain review in *federal* court of an issue of *federal* law. The district court disagreed on very broad grounds, finding that, "Sprint's state court action . . . is properly characterized as an appeal from the IUB orders," and that "a state court's review" of a state agency decision is "an uninterruptible process under the *Younger* doctrine." Pet. App. 24a.

The district court's holding that state-court review of a state-agency decision—even review of issues of federal law arising under the 1996 Act—is an "uninterruptible process" was nothing short of alarming. The clear implication was that, under *Younger*, *all* state-agency decisions *must* be appealed *only* through the state system, and federal-court review is unavailable—even where, as in this case, the district court unquestionably has *jurisdiction* to hear the issues presented to it.

Sprint accordingly appealed to the Eighth Circuit, which had jurisdiction under 28 U.S.C. § 1291, arguing that the lower court's broad holding would allow *Younger* to defeat the district courts' "virtually unflagging obligation" to decide cases subject to their jurisdiction in a broad range of proceedings. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Sprint therefore urged the Eighth Circuit to construe its *Younger* test more narrowly than the district court had done, and consistently with the tests used in other circuits. In particular, Sprint argued that the court should construe the "state interest" prong of its test for *Younger* abstention to mandate the kind of *coercive*

state interest that other courts of appeals require. Sprint maintained that run-of-the-mill, *remedial* state-agency adjudications, unlike state criminal and quasi-criminal proceedings, do not implicate the coercive state interests to which *Younger* applies.

After briefing in the Eighth Circuit but before oral argument, the Eighth Circuit issued a decision expressly *rejecting* the coercive/remedial distinction advanced by Sprint in this case, although acknowledging that other circuits find that distinction "outcome determinative" under *Younger*. *See Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011). *Hudson* thus suggested that the Eighth Circuit's *Younger* standard requires abstention in essentially all state agency proceedings, but the court did leave open the possibility that abstention might not apply in cases involving a "pervasive federal regulatory scheme." *Id.* at 988. At oral argument, Sprint emphasized that this case *does* involve a pervasive federal regulatory scheme—the 1996 Act, under which state telecommunications regulators act as "deputized federal regulators." *See Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 595 (7th Cir. 2008). The IUB, in contrast, boldly proclaimed that *Younger* abstention applies to *all* of its proceedings regardless of the legal regime involved—*i.e.*, that review of IUB decisions is available only through the state court system.[7]

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[7] The Eighth Circuit's recording equipment malfunctioned during argument so there is no record of the IUB's position—but the IUB was by no means reluctant to advance it, and so will presumably take the same position here.

The Eighth Circuit's decision below reaffirmed *Hudson*, rejecting Sprint's claim that the state-interest prong of the Eighth Circuit's *Younger* test was not met because the IUB proceeding was not coercive. Pet. App. 6a. The court also closed the door left open by *Hudson*, finding that because the state here has a "substantial, legitimate interest in regulating intrastate retail [telecommunications] rates," it makes no difference that this case involves a "pervasive federal regulatory scheme." *Id.* at 7a. In short, the Eighth Circuit upheld abstention in this case as a run-of-the mill application of its *Younger* standard, now clearly construed never to require a coercive state proceeding.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve an important—and deeply rooted—split between the Eighth Circuit and the other circuits over the scope of *Younger* abstention. Nine circuits apply *Younger* only if the ongoing state proceeding is "coercive"—*i.e.* if it was initiated by the state to punish the federal plaintiff for wrongdoing. The Eighth Circuit has split with the other circuits by rejecting this limitation on *Younger*, thus applying *Younger* to prevent a federal plaintiff from challenging *any* decision of a state administrative body in federal court. As a result, cases that routinely go forward in nine other circuits are forced to proceed in state court if they arise in the Eighth Circuit.

This Court should also grant certiorari because the Eight Circuit's decision conflicts with this Court's longstanding jurisprudence that "a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal

claims fully in the federal courts." *See, e.g.*, *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 417 (1964). Consistent with that principle, this Court has specifically allowed for federal courts to review the decisions of state telecommunications regulators. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002). The Eighth Circuit's decision is inconsistent with this line of cases.

Finally, the Court should grant certiorari because the Eighth Circuit's decision is inconsistent with the Court's abstention cases and creates confusion in abstention law. In particular, the decision is inconsistent with *Ohio Civil Rights Commission v. Dayton Christian Schools., Inc.*, 477 U.S. 619 (1986), which created the coercive/remedial distinction. The Eighth Circuit's approach also confuses *Younger* abstention with *Burford* abstention, which is designed to protect the sort of non-coercive state interests at issue here.

I. The Court Should Grant Certiorari to Resolve the Circuit Split over the Scope of *Younger* Abstention.

A. The Eighth Circuit Has Split With Nine Other Circuits in Rejecting the Coercive/Remedial Distinction.

The Eighth Circuit's decision to abstain in this case rejects the majority rule that the federal courts may invoke *Younger* abstention *only* when the "the state has instituted a criminal, disciplinary, or other enforcement proceeding" against the federal plaintiff, and the federal lawsuit would interfere with that proceeding. *See Nader v. Keith*, 385 F.3d 729, 732

(7th Cir. 2004). This requirement is frequently summarized by saying that the state proceeding must be "coercive" rather than "remedial," and the courts using those terms generally define the state proceeding as coercive if "the federal plaintiff had engaged in misconduct" and the state proceeding "would ultimately impose punishment for that misconduct." *Brown ex. rel. Brown v. Day*, 555 F.3d 882, 892 (10th Cir. 2009).

The majority rule is clearly applied in at least four circuits[8] (the First, Sixth, Seventh, and Tenth) and apparently so in five more[9] (the Second, Third, Fourth, Ninth, and Eleventh).

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[8] *See Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 522 (1st Cir. 2009); *Devlin v. Kalm*, 594 F.3d 893 (6th Cir. 2010); *Majors v. Engelbrecht*, 149 F.3d 709 (7th Cir. 1998); *Brown ex. rel. Brown v. Day*, 555 F.3d 882, 893 (10th Cir. 2009).

[9] *Univ. Club v. City of New York*, 842 F.2d 37 (2d Cir. 1988) (determining that relevant state proceeding was "coercive" rather than "remedial" and rejecting argument that abstention was inappropriate); *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 106 (2d Cir. 1997) (*Younger* abstention was inappropriate because, among other things, the state proceeding was "essentially a suit for money damages" rather than a "sovereign enforcement proceeding"); *Wyatt v. Keating*, 130 Fed. Appx. 511, 514-15 (3d Cir. 2005) (unpublished); *O'Neill v. City of Philadelphia*, 32 F.3d 785, 791 n.13 (3d Cir. 1994); *Moore v. City of Asheville*, 396 F.3d 385, 394-95 (4th Cir. 2005) (noting that *Huffman* extended *Younger* "into a state coercive civil proceeding" and focusing on whether the federal litigation would "disrupt[] important state enforcement efforts"); *id.* at 395 n.4 (noting that Supreme Court has distinguished between "coercive" and

By contrast, two Eighth Circuit cases in quick succession (including this one) have now split with the other circuits, invoking *Younger* abstention in favor of non-coercive state-level administrative proceedings. In the first case, *Hudson v. Campbell*, 663 F.3d 985 (8th Cir. 2011), the plaintiff filed a federal lawsuit challenging the State of Missouri's decision to deny her Medicaid benefits. The district court abstained under *Younger*, and the plaintiff argued on appeal that *Younger* abstention was inappropriate because the state proceeding was remedial, not coercive. The Eighth Circuit acknowledged that "[o]ther circuits recognize a distinction between coercive and remedial actions and require exhaustion of state appellate remedies

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"remedial" administrative proceedings, "concluding that *Younger* requires federal courts to abstain in favor of pending state administrative proceedings that are coercive in nature"); *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 166 (4th Cir. 2008) (affirming abstention after finding that the state proceeding was "clearly coercive"); *Woollard v. Sheridan*, No. 10-2068, 2010 WL 5463109, at *4 (D. Md. Dec. 29, 2010) (referring to the coercive-remedial distinction as "the key factor" in its analysis and noting that the "Fourth Circuit . . . has abstained pursuant to *Younger* only in favor of administrative proceedings it deems 'coercive.'"); *Green v. City of Tucson*, 255 F.3d 1086, 1102 n.16, *limited on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004); *Wexler v. Lepore*, 385 F.3d 1336, 1340 (11th Cir. 2004) ("Second, we have found no binding precedent requiring federal plaintiffs to raise federal claims in pending state court proceedings where they are also plaintiffs. Abstention might be more appropriate when the federal plaintiff, as a defendant in state court, chose not to assert a constitutional *defense*.").

only in those that are coercive in nature." *Id.* at 987 (emphasis added). But it held that, unlike the other circuits, "we have not considered the distinction to be outcome determinative" and noted that in past cases "we afforded *Younger* deference to the state administrative proceedings without classifying the proceeding as coercive or remedial." *Id.* at 987-88. The Eighth Circuit thus required abstention even though it expressly acknowledged that courts in five other circuits would not have done so. *Id.* at 987.

In reaching this result, the Eighth Circuit contrasted its ruling with the Tenth Circuit's decision in *Brown*, 555 F.3d at 889. In *Brown*, which mirrors the facts of *Hudson*, the State terminated Brown's Medicaid benefits on the basis that she was no longer eligible. As in *Hudson*, Brown sued the State in federal court, claiming that the State's eligibility determination violated federal law. The State asked the district court to abstain—even threatening to file a "Petition for Civil Enforcement"—and the district court obliged. But unlike in *Hudson*, the Tenth Circuit reversed, finding that the state administrative proceedings were not "the *type* of state proceeding that is due the deference accorded by *Younger* abstention." 555 F.3d at 888. In reaching that conclusion, the Tenth Circuit held that *Younger* abstention is appropriate only if the state proceedings are "coercive," and found that the state Medicaid proceeding was not coercive. It emphasized that a coercive proceeding involves "a state's enforcement of its laws or regulations in an administrative proceeding," *id.* at 890, and held that a "common thread" in coercive proceedings is that "the federal plaintiff sought to thwart a state administrative proceeding initiated to punish the

federal plaintiff for a bad act," *id.* at 891. The Tenth Circuit's decision in *Brown*—echoed by the courts of eight other circuits—thus stands in sharp contrast to the Eighth Circuit's opinion in *Hudson*.

The Eighth Circuit continued its departure from established law in the proceedings below. Because *Hudson* had not yet been decided at the time Sprint's briefs were due, Sprint argued that *Younger* abstention was inappropriate because the state proceedings were remedial, not coercive. Nevertheless, the Eighth Circuit took this case as an opportunity to reaffirm *Hudson*. It confirmed its position that the coercive/remedial distinction is "not . . . outcome determinative" and held that *Younger* abstention was appropriate without further discussing the issue. Pet. App. 6a-7a.

Although the Eighth Circuit did not explicitly acknowledge the circuit split here as it did in *Hudson*, it bears emphasis that this case—like *Hudson*—would not have triggered abstention in any of the nine circuits applying the majority rule. That is because the proceedings before the IUB were initiated *by Sprint* to resolve a garden-variety commercial dispute with Windstream—not to punish Sprint for any sort of misconduct. And the proceedings before the Iowa District Court were initiated *by Sprint* to challenge the IUB's interpretation of the law. Thus, under the rule applied outside the Eighth Circuit, this case would never have been a candidate for *Younger* abstention.

B. The Roots of the Circuit Split Are Deep and Thus Unlikely to Be Resolved Without Intervention by this Court.

Although the Eighth Circuit has explicitly rejected the coercive/remedial distinction only recently, the seeds of the current circuit split have been sewn over the last two decades. Because the division between the Eighth Circuit and the other circuits has been so persistent, the split is unlikely to be resolved without the intervention of this Court.

The roots of the current split go back to at least 1990 in a series of cases involving the Alleghany Corporation ("Alleghany"). Those cases arose when Alleghany sought to acquire shares of an insurance holding company, an act that required approval of the insurance commissions of a number of states. After commissions in Indiana, Wisconsin, North Dakota, and Nebraska denied Alleghany's applications, it filed lawsuits in several federal district courts. The state insurance commissions asked the courts to abstain under *Younger*, arguing that the federal lawsuit would interfere with the proceeding before the insurance commissions. And although Alleghany had chosen not to appeal that decision in state court, the commissions argued that Alleghany had to exhaust its state appellate remedies and could not challenge the proceeding in federal court.

The cases eventually ended up on appeal in the Seventh and Eighth Circuits, and both courts considered whether to apply *Younger* abstention. The two courts came to vastly different conclusions.

The Seventh Circuit held that *Younger* did not apply because the state had not initiated any type of enforcement action against Alleghany—a distinction that would equally preclude abstention in this case: "*Younger* is confined to cases in which the federal plaintiff had engaged in conduct actually or arguably in violation of state law, thereby exposing himself to an enforcement proceeding in state court which, once commenced, must be allowed to continue uninterrupted to conclusion . . . ." *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990) (Posner, J.), *vacated as moot sub nom. Dillon v. Alleghany Corp.*, 499 U.S. 933 (1991).[10]

Less than a week later—and without so much as a citation to the Seventh Circuit's opinion—the Eighth Circuit issued a set of opinions conflicting with the Seventh Circuit's decision. *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990); *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990). Contrary to the Seventh Circuit, the Eighth Circuit held that *Younger* abstention applies even

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[10] *Haase* was summarily vacated as moot in *Dillon v. Alleghany Corp.*, 499 U.S. 933 (1991), but the Seventh Circuit has reaffirmed *Haase*'s holding regarding *Younger*: "The district court properly relied on our decision in *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990), *vacated as moot*, 499 U.S. 933, . . . where we noted that '*Younger* is confined to cases in which the federal plaintiff ha[s] engaged in conduct actually or arguably in violation of state law, thereby exposing himself to an enforcement proceeding in state court * * *.'" *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992); *see also id.* at 1333 n.7 (noting that *Haase* was vacated only because it had become moot).

though Alleghany was accused of no wrongdoing, and the state had commenced no enforcement proceedings against it: "[W]e find no merit in Alleghany's argument that *Younger* abstention applies only where there is a pending state enforcement proceeding." *McCartney*, 896 F.2d at 1145. In reaching this conclusion, the Eighth Circuit relied on this Court's decision in *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1 (1987), which it interpreted to allow abstention "in a state proceeding between two private parties." *McCartney*, 896 F.2d at 1145. The court did not grapple with *Pennzoil*'s admonition that "[o]ur opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court." 481 U.S. at 14 n.12.

The Eighth Circuit's conflicting position did not go unnoticed by the Seventh Circuit, however. That court issued an Order noting that the Eighth Circuit had reached decisions "opposite to, but apparently unaware of, our decision," and stating that "[w]e are not persuaded to abandon our position." *Haase*, 896 F.2d at 1056 (Order).

The Eighth Circuit's split with the Seventh Circuit in the *Alleghany* cases foretold a vast expansion of the *Younger* doctrine in the Eighth Circuit. In a number of subsequent cases, the Eighth Circuit continued to invoke *Younger* abstention in cases that were unquestionably remedial rather than coercive. For example, in *Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475 (8th Cir. 1998), the federal plaintiff had applied for permission to open a nude-dancing facility, and that application was denied because the city's Planning Commission interpreted

the zoning laws not to allow nude dancing. Although there was no hint that the federal plaintiff was guilty of any wrongdoing or that the city had begun any proceeding to punish wrongdoing, the Eighth Circuit abstained in favor of the state proceedings, citing *Younger*.

This long line of cases shows that the Eighth Circuit is unlikely to retreat from its more recent rejection of the coercive/remedial distinction.

II. The Decision Below is Inconsistent with this Court's Jurisprudence Establishing the Primacy of the Federal Judiciary in Deciding Questions of Federal Law.

As discussed above, Sprint's federal complaint in this case presented *only* issues of federal law—specifically, Sprint argued that the IUB lacked authority under the 1996 Act to determine whether access charges apply to VoIP traffic and that the IUB's finding that such charges do apply also violated the Act. The Eighth Circuit's novel application of *Younger* to bar Sprint from receiving federal court review of these federal questions is flatly inconsistent with this Court's longstanding general rule that "a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *England*, 375 U.S. at 417.

This Court has, of course, long emphasized the district courts' "virtually unflagging obligation" to decide cases brought before them, noting that "[t]his obligation does not evaporate simply because there is a pending state court action involving the same

subject matter." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops, Inc.*, 48 F.3d 294, 297 (8th Cir. 1995) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)). The Court's decision in *England* explored the relationship between the general rule and abstention doctrine's exceptions to it. The Court first explained:

> Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and . . . "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

England, 375 U.S. at 415. (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909)). Abstention, the Court observed, provides exceptions to this rule only in certain limited circumstances:

> Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." *Louisiana P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.

Id. at 415-16 (citation omitted). Again, however, this case does not involve state exposition, administration, or enforcement of state law. To the contrary, the Eighth Circuit's decision below directly

undermines the "primacy of the federal judiciary in deciding questions of federal law," mandating that Sprint's federal questions go to state court notwithstanding the district court's unquestioned jurisdiction over those issues.

This Court applied the general rule set forth in cases like *Willcox* and *England* to a case very similar to this in *Verizon Maryland*, 535 U.S. 635, which confirms the federal courts' authority to review state utility orders on the 1996 Act. *Verizon Maryland* involved Section 252 of the 1996 Act, which confers on state commissions the authority to approve and interpret "interconnection" agreements between incumbent local exchange carriers ("ILECs") and the competitive local exchange carriers ("CLECs") that the 1996 Act sought to encourage. 535 U.S. at 638. In the state proceeding there, the Maryland PUC had found that Verizon Maryland owed WorldCom a kind of intercarrier compensation ("reciprocal compensation") under the terms of the agreement between the carriers. *Id.* at 639.

Verizon sought review in federal district court, arguing that the Maryland PUC's ruling was preempted by federal law, much as Sprint argued below. *Id.* The Maryland Commission took the position that Verizon had no right to federal court review. *Id.* at 642. This Court squarely rejected that argument, finding that Verizon was entitled to district court review for the simple reason that its claim "falls within 28 U.S.C. § 1331's general grant of jurisdiction." *Id.* at 643.

Verizon Maryland thus applied the general rule that federal courts should decide issues of federal law whenever their jurisdiction is properly invoked

to the very context at issue here—review of state PUC decisions on issues of federal law. That is exactly what Sprint sought below, and the Eighth Circuit's decision is thus inconsistent with both this Court's general rule and with *Verizon Maryland*.

III. The Decision Below is Inconsistent with this Court's Abstention Cases and Will Result in Further Confusion of Abstention Law in the Eighth Circuit and Beyond.

As discussed above, the Eighth Circuit's decision is inconsistent with *Younger* abstention law in other circuits. But that decision also both conflicts with and thoroughly confuses this Court's abstention precedents.

First, the decision below is inconsistent with the basic principle underlying this Court's abstention cases, which is that *state* courts should be allowed to interpret *state* statutory, regulatory, and enforcement regimes without undue interference from *federal* courts. Here, in contrast, Sprint's efforts to obtain review concern the *federal* courts' authority (and, indeed, responsibility) to decide *federal* law issues as to which *state* agencies have no authority whatsoever. Second, the Eighth Circuit's approach conflicts with *Dayton*, which established the remedial/coercive distinction applied by other circuits. And finally, the decision below conflates *Younger* with *Burford* abstention, threatening further confusion in the lower courts.

A. The Purposes of Abstention Doctrine Do Not Apply Here.

A brief overview of the abstention doctrines amply demonstrates that the concerns animating abstention are entirely inapposite here. The first class of cases to which abstention applies was recognized by this Court in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), which involved a constitutional challenge to an order of the Texas Railroad Commission requiring that a Pullman conductor (rather than a porter) be present in any train car with a sleeper. A federal district court had enjoined the Texas law on the ground that the relevant Texas statutes did not authorize the order, but the Court reversed. The Court pointed out that the lower federal court's view of Texas law was not authoritative, but merely a "forecast," and that "the reign of law is hardly promoted if an unnecessary ruling of a federal court is [soon after] supplanted by a controlling decision of a state court." *Id.* at 500. *Pullman* abstention, then, requires a federal court to stay its hand when the resolution of unsettled questions of state law by state courts may make it unnecessary to decide a federal constitutional question. This allows state courts to provide needed (and authoritative) answers to state law questions without undue federal interference. In short, abstention began in *Pullman* as a doctrine of non-interference with state court construction of state law.

Two years after *Pullman*, the Court in *Burford* recognized a second class of case in which federal courts may decline to exercise their jurisdiction. There, the plaintiff sought federal court review of a

Texas Railroad Commission order granting a permit to drill oil wells on the basis of that commission's rules specifying minimum spacing between wells but allowing exceptions to those rules under certain circumstances. Under Texas law, review of Railroad Commission orders was concentrated in the courts of Travis County, Texas, such that "the Texas courts [were] working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Burford v. Sun Oil Co.*, 319 U.S. 315, 326 (1943). The Court found that the federal plaintiff's case raised "questions of regulation of the [oil] industry by the State administrative agency," and that "[c]onflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts" to review Railroad Commission orders. *Id.* at 332, 334. Like *Pullman*, then, *Burford* abstention is also a doctrine of non-interference in the state's administration of its own laws and regulations, reflecting a "reluctance to intrude into state proceedings where there exists a complex state regulatory system." *New Orleans Public Serv. Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*") (quoting *NOPSI v. City of New Orleans*, 798 F.2d 858, 861-62 (5th Cir. 1986)).

Younger, the third major category of abstention cases recognized by this Court, is a direct descendant of *Pullman* and *Burford*. In *Younger*, the federal plaintiff sought to enjoin a state criminal prosecution on the ground that the state's criminal syndicalism law, under which he was charged, was unconstitutional. The Court held that Congress over the years has indicated that state courts should be

permitted to "try state cases free from interference by federal courts" and indeed that to do otherwise would "unduly interfere with the legitimate [enforcement] activities of the States." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

Subsequent cases of this Court extended *Younger* to certain state civil-enforcement proceedings. Many of those cases emphasized that the state was a party to the enforcement proceedings, and that its interest was thus "in important respects . . . more akin to a criminal prosecution than are most civil cases." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (under *Younger*, action by state to enforce nuisance statute barring exhibition of obscene films could not be enjoined); *accord Moore v. Sims*, 442 U.S. 415, 423 (1979) (action by state for temporary custody of children was like *Huffman*, since the state was a party to the proceeding and civil enforcement in context of suspected child abuse was in aid of and closely related to criminal statutes); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431-32 (1982) (state proceeding to discipline an attorney bore a close relationship to proceedings of a criminal nature).[11] And *all* of this

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[11] In other *Younger* decisions, the Court emphasized that the federal courts should be wary of interfering with state enforcement proceedings that are part and parcel of state administration of its regulatory programs. For example, in *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977), the Court found that an action "brought by the State in its sovereign capacity" to recover welfare payments was subject to *Younger* abstention because it was part of the state's critical role in administering its public assistance programs. The Court has also found that federal constitutional challenges to the processes by which the

Court's *Younger* cases represent "variations" on *Burford*, *see* 17A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 4241 (3d ed.)—the central tenet of the cases is that just as the federal courts should not unduly interfere with a state's administration of its own statutory and regulatory regimes, neither should the federal courts unduly interfere with a state's administration of its criminal and civil-enforcement mechanisms.

In short, the fundamental principle of non-interference in matters of the States' administration and enforcement of their own laws that underlies all of abstention law is utterly inapposite here. The Eighth Circuit's extension of "abstention" doctrine to this case thus makes nonsense of the doctrine.

B. The Eighth Circuit's Rule Ignores the Remedial/Coercive Line Drawn by this Court's Precedents.

As discussed in Part I, *supra*, the Eighth Circuit's decision below rejects the remedial/coercive line for application of *Younger* employed by other circuits. But it bears emphasis that other circuits did not

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State compels compliance with the judgments of its courts raise the specter of undue interference with a state's administration of its laws and regulatory regimes. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (federal court interference with contempt proceeding in civil case is "'an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding'") (ellipsis in *Juidice*); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987) (challenge to bond and lien provisions that state used to "compel[] compliance with the judgments of its courts" was subject to *Younger*).

invent that test out of whole cloth—rather, it comes directly from this Court's precedents. The roots of the distinction go back to the long line of cases that gradually extended *Younger* from a doctrine applicable only when there was a pending state *criminal* proceeding to a doctrine that also applies to certain civil cases. In making this expansion, the Court repeatedly emphasized that *Younger* would apply only to a limited category of civil proceedings—proceedings which were "more akin to a criminal prosecution than are most civil cases," *Huffman*, 420 U.S. at 604, cases involving "an ongoing civil enforcement action . . . brought by the State in its sovereign capacity," *Trainor*, 431 U.S. at 444, and cases involving "challenges to the processes by which the State compels compliance with the judgments of its courts," *Pennzoil*, 481 U.S. at 13-14. *See also NOPSI*, 491 U.S. at 367-68 (discussing categories).

In expanding *Younger* beyond criminal cases, however, this Court has carefully emphasized that it was *not* expanding *Younger* to all civil proceedings. *Pennzoil*, 481 U.S. at 34 n.12 ("Our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court."); *Moore*, 442 U.S. at 423 n.8 ("[W]e do not remotely suggest 'that every proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies.'"). And the Court warned that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813; *accord NOPSI*, 491 U.S. at 368 ("only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States").

These principles culminated in a Supreme Court case specifically announcing the remedial/coercive distinction. In *Dayton*, the Court clarified the line between state administrative proceedings to which abstention applies and those to which it does not. The *Dayton* Court distinguished its earlier holding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), that a federal employment discrimination claim could proceed without exhaustion of or deference to state administrative proceedings. Specifically, the *Dayton* Court found that *Younger does* apply to administrative action brought by a state agency to vindicate the State's policy against sex discrimination. The Court wrote:

> The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy v. Florida Board of Regents*, which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. Unlike *Patsy*, the administrative proceedings here are *coercive rather than remedial*, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton, 477 U.S. at 627 n.2 (emphasis added and citations omitted). As subsequent courts have recognized, "[t]he critical distinction" between *Dayton* and *Patsy* was that *Dayton* involved a "coercive" proceeding, whereas *Patsy* did not. *See, e.g. O'Neill v. City of Philadelphia*, 32 F.3d 785, 791 n.13 (3d Cir. 1994).

The Eighth Circuit's decision below is thus not only inconsistent with the principles underlying

Younger abstention, but also with this Court's specific distinction, in *Dayton*, of coercive state proceedings to which *Younger* does apply from remedial proceedings where it does not.

C. The Eighth Circuit's Decision Improperly Conflates *Burford* and *Younger* Abstention.

The Eighth Circuit's decision thoroughly confuses abstention law by conflating the *Burford* and *Younger* doctrines into a new, unrecognizably broad kind of abstention.

As discussed above, the *Burford* abstention cases require the federal courts to administer their regulatory regimes without undue interference from the federal courts. And the *Younger* cases prevent federal court interference with state criminal and similar civil-enforcement regimes. At first blush, this case falls far closer to the *Burford* line of cases than to the *Younger* cases. The state interests identified by the IUB in the district court—"enforcing the terms of telephone company tariffs and otherwise regulating the telephone companies" and the "protection of . . . citizens" who make phone calls in Iowa (*see* J.A.248-249)—were closely related to the *Burford* policy of non-intervention in state regulatory affairs. The Eighth Circuit decision makes this point even more clearly, identifying no *Younger*–style enforcement interest, but only a "generic" interest in the "regulation of utilities." Pet. App. 7a-8a.

Below, however, the IUB did not even attempt to invoke *Burford* abstention. And the reason why it did not is simple—application of *Burford* to this case would have been squarely foreclosed by this Court's

decision in *NOPSI*. Like this case, *NOPSI* involved a claim that federal law preempted a decision of a state regulatory agency—specifically, that a Federal Energy Regulatory Commission order requiring that the costs of planned nuclear reactors should be allocated to power companies in proportion to each company's share of overall demand preempted the New Orleans City Council's order denying a rate adjustment. *NOPSI*, 491 U.S. at 352-57. In reversing the lower courts' application of *Burford*, this Court observed that "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *Id.* at 362. The Court further explained:

> Here, NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem[.]"

Id. (citation omitted). Finally, the Court noted that "no inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is

facially pre-empted by FERC's allocative decree," *id.* at 363, and emphasized that there is "'no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy,'" *id.* (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)); *see also GTE North, Inc. v. Strand*, 209 F.3d 909, 920-21 (6th Cir. 2000) ("Because Congress has invested the federal courts with primary responsibility for adjudicating [Federal Telecommunications Act] challenges to state telecommunications regulations, and because this case does not concern a disputed issue of state law, but rather a potential conflict between state and federal telecommunications laws, *Burford* abstention is inappropriate.") (citing *NOPSI*).

This Court's ruling in *NOPSI* is, of course, equally apropos in this case. The lower courts could have resolved the federal preemption arguments advanced by Sprint without any inquiry "beyond the four corners" of the IUB's order, and federal adjudication of that claim would not have disrupted Iowa's administration of its regulatory regime. Presumably, then, IUB chose not to invoke *Burford* because it was aware that this Court had stated—in a case very much like this one—that the *Burford* doctrine does not apply. Instead, the IUB convinced the Eighth Circuit to expand *Younger* beyond recognition.

In short, the Eighth Circuit's application of abstention in this case blurred the lines that this Court has drawn in its *Burford* and *Younger* cases in a way that makes no sense. This Court should correct the Eighth Circuit's confusing and overly expansive reading of *Younger*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2, 2013

APPENDIX

12-815

Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Appendix A (*Sprint Communications Co., L.P., v. Jacobs*, Court of Appeals for the Eighth Circuit Opinion, Filed Sep. 4, 2012) 1a

Appendix B (District Court for the Southern District of Iowa Order, Filed Aug. 1, 2011) 11a

Appendix C (Iowa Utilities Board Order, Issued March 25, 2011) 28a

Appendix D (Iowa Utilities Board Order, Issued Feb. 4, 2011) 60a

Appendix E (Relevant Portions of the United States Code) 159a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Submitted March 13, 2012 Filed September 4, 2012

No. 11-2984

SPRINT COMMUNICATIONS COMPANY, L.P.,
PLAINTIFF-APPELLANT

v.

ELIZABETH S. JACOBS; SWATI A. DANDEKAR; DARRELL HANSON, IN THEIR CAPACITIES AS MEMBERS OF THE IOWA UTILITIES BOARD,
DEFENDANTS-APPELLEES[1]

Appeal from United States District Court
for the Southern District of Iowa – Des Moines

BEFORE: Wollman, Colloton, and Benton, *Circuit Judges*.

---

[1] Board members Jacobs and Dandekar are substituted for their predecessors pursuant to Federal Rule of Appellate Procedure 43(c)(2).

WOLLMAN, Circuit Judge.

Sprint Communications Company, L.P. (Sprint) contests the Iowa Utilities Board's (IUB) order compelling it to pay intrastate access charges to Windstream, an Iowa communications company, for Voice over Internet Protocol (VoIP) calls. Sprint filed a complaint in federal district court seeking declaratory and injunctive relief. The same day, Sprint also filed a petition for review in Iowa state court, asserting, among other claims, that the IUB's order was preempted under federal law. The federal district court abstained pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and dismissed the action. Sprint appeals, arguing that abstention is inappropriate in this case, and that even if appropriate, the district court should have stayed the case rather than dismissing it. We affirm the district court's decision to abstain, but we vacate the judgment of dismissal and remand the case with instruction to stay the proceedings.

I.

Windstream charges Sprint intrastate access charges to connect certain VoIP calls to Windstream customers. Sprint initially paid the charges, but later concluded that it was not required to pay intrastate access charges for the VoIP traffic. Sprint determined that the calls at issue are an "information service" and, as such, "not subject to access charges, whether those charges are interstate or intrastate." Appellant Br. 10. After Sprint discontinued payment, it filed a complaint with the

IUB seeking a declaration that its decision to withhold the access charges claimed by Windstream was appropriate. Sprint argued that because only the Federal Communications Commission (FCC) has authority to classify the VoIP traffic, the IUB lacked jurisdiction to decide the issue. The IUB determined that it had jurisdiction and that Sprint was required to pay the access charges. Following the IUB's denial of Sprint's motion for reconsideration, Sprint filed this action in federal district court and, on the same day, a petition for review of the IUB's decision in Iowa state court. The IUB filed a motion to dismiss the federal litigation on abstention grounds. The district court granted the motion and dismissed the case, concluding that the state of Iowa has a substantial interest in the regulation of utilities within the state.

Because we decide only whether abstention was appropriate in this case, we do not reach the merits of Sprint's claim that Windstream's intrastate access charges do not apply to Sprint's VoIP traffic. The determination of that issue will turn on whether Sprint's VoIP traffic is an intrastate "telecommunications service" subject to IUB regulation, *see* 47 U.S.C. § 152(b),[1] or whether, as Sprint suggests, the calls at issue are included

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[1] Section 152(b) provides that, with certain exceptions, "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service...." Section 152(b) thus reserves a role for state regulation of intrastate communications.

within the definition of "information service," *see* 47 U.S.C. § 153(24), which classification remains largely unregulated and exempt from access charges. For our discussion of the FCC's preemption of state regulation of the VoIP service at issue in that case, see *Minnesota Public Utilities Commission v. Federal Communications Commission*, 483 F.3d 570 (8th Cir. 2007).

II.

We review a district court's decision to abstain for abuse of discretion. *Plouffe v. Ligon*, 606 F.3d 890, 893 (8th Cir.2010); *but see id.* at 894–95 (Colloton, J., concurring).

Sprint first argues that it had the right to challenge the IUB's order in federal court. We do not disagree. But Sprint goes on to argue that its decision to file a state court petition for review should not affect our *Younger* abstention analysis. Sprint cites *Alleghany Corp. v. McCartney*, for the proposition that "a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies." 896 F.2d 1138, 1144 (8th Cir.1990). Sprint argues that *McCartney* teaches "that a federal plaintiff cannot trigger or avoid *Younger* abstention simply by filing or choosing not to file state-court proceedings." Appellant Br. 24. More accurately, *McCartney* holds that once a party initiates state "judicial" proceedings in which the state has an important interest, the party must follow the proceedings through to the end. The parallel state

court proceeding thus has a bearing on our abstention analysis.[2]

Next, Sprint argues that abstention is inappropriate in this case because this case does not implicate the concerns the *Younger* abstention doctrine addresses. Whether *Younger* abstention is appropriate is determined by the factors outlined in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). *Middlesex* held that federal courts should exercise *Younger* abstention when (1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. *Id.* at 432, 102 S.Ct. 2515; *see also Fuller v. Ulland*, 76 F.3d 957, 959 (8th Cir.1996). Sprint argues that neither the first factor nor the second was met in this case. The third factor is not in dispute.

A.

Sprint contends that the first *Middlesex* factor is not met because the remedy it seeks would not interfere with any ongoing state proceeding. Sprint seeks a declaration that the IUB's order violates federal law and an order enjoining the IUB from enforcing its order requiring Sprint to pay intrastate

---

[2] Contrary to Sprint's contention, we conclude that *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), a case in which there was no ongoing state judicial proceeding, has no bearing on this case.

access charges for the VoIP traffic at issue. Sprint argues that the only interference that could result from these remedies is the possible effect of collateral estoppel on the state court proceeding, an effect that is not the type of interference that *Younger* abstention seeks to prevent. We conclude that interference beyond simple collateral estoppel would result from a federal court's declaration of how a state utilities board should interpret its state's laws and regulations governing intrastate access charges and the entry of an order enjoining enforcement thereof. *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 882 (8th Cir. 2002) (concluding that the serious possibility of interference resulting from the use of a federal court injunction to preclude a state court remedy warranted *Younger* abstention). Interests of comity and federalism support federal abstention where state judicial review of the IUB's order has not yet been completed. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 367–69, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

B.

Sprint also contends that the important state interest prong of *Middlesex* is also not met. Sprint first suggests that Iowa lacks a sufficiently important interest in the proceeding at issue because the proceedings are remedial, rather than coercive, arguing that *Younger* applies only to coercive proceedings. Following our holding in *McCartney*, we held otherwise in *Hudson v. Campbell*, 663 F.3d 985, 987–88 (8th Cir.2011). "Although we have recognized

the existence of the coercive-remedial distinction in other of our abstention cases, we have not considered the distinction to be outcome determinative." *Id.* at 987 (internal citations omitted). The same analysis applies in the present case.

Sprint continues by arguing that the state proceedings do not implicate an important state interest because telecommunications issues are not solely within the ambit of state regulatory authority. Sprint points to *McCartney*, in which we stated that cases in the public utility area involve "a pervasive federal regulatory scheme which indicate[s] a strong federal interest." 896 F.2d at 1145. True enough, but as the Supreme Court observed in *NOPSI*, states have "a substantial, legitimate interest in regulating intrastate retail rates." 491 U.S. at 365, 109 S.Ct. 2506. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Id.* (alteration in original) (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983)).

The Supreme Court also noted in *NOPSI* that:

> [W]hen we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

Id. at 365, 109 S.Ct. 2506. In this case, as in *NOPSI*, the generic proceedings involve the state's regulation of intrastate utility rates. Sprint attempts to avoid the conclusion that Iowa has an important interest in the proceedings by contesting the IUB's authority even to decide whether intrastate access charges apply to VoIP traffic. This argument impermissibly narrows the focus to the outcome of the case, rather than the importance of the generic proceedings to the state. *See id.* at 366, 109 S.Ct. 2506 (rejecting a similar argument challenging "the very right of the Council to conduct ... deliberations"). Just as it had in enforcing its consumer protection statutes, *see Cedar Rapids Cellular*, 280 F.3d at 879–80, Iowa has an important state interest in regulating and enforcing its intrastate utility rates.

The Supreme Court went on in *NOPSI* to determine "whether the [state] court action is the type of proceeding to which *Younger* applies." 491 U.S. at 367, 109 S.Ct. 2506. The Court distinguished between state judicial inquiries and legislation, noting that only judicial proceedings are entitled to *Younger* abstention. *Id.* at 368, 109 S.Ct. 2506. In discussing the difference between judicial and legislative proceedings, the Court quoted *Prentis v. Atlantic Coast Line Company*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes

> existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind....

Id. at 226, 29 S.Ct. 67. The IUB is not attempting to establish a rate for the future, but rather is seeking to enforce the status quo that existed before Sprint ceased paying the intrastate access charges. The IUB's order attempts to enforce liabilities based on present facts and existing laws, and thus it constitutes a judicial proceeding that is entitled to *Younger* abstention.

III.

Finally, Sprint contends that, if abstention is appropriate, the district court should have stayed rather than dismissed the case. We agree, for we have held that district courts should stay the case when there is a possibility that the parties will return to federal court. *Cedar Rapids Cellular,* 280 F.3d at 882–83; *Fuller,* 76 F.3d at 960–61. That being the case here, we conclude that the district court should have stayed rather than dismissed the case.

IV.

We affirm the district court's decision to abstain from exercising jurisdiction over Sprint's claims. We vacate the judgment of dismissal and remand the case to the district court for the entry of a stay of this action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Sprint Communications Company, L.P., Plaintiff	Filed On: August 1, 2011
v.	No. 4:11-cv-00183-JAJ
Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their Official Capacity as Members of the Iowa Utilities Board Defendants.	

ORDER

This matter comes before the Court pursuant to Defendants' May 16, 2011 Motion for Abstention and Request for Expedited Relief. (Dkt. No. 5). Defendants are Robert B. Berntsen, Krista Tanner, and Darrell Hanson, all in their official capacity as members of the Iowa Utilities Board (collectively, "IUB"). Plaintiff Sprint Communications Company filed an Opposition to IUB's motion on June 3, 2011. (Dkt. No. 12).

Windstream Iowa Communications, Inc. filed a Motion to Intervene on June 13, 2011, to which it attached its own Motion to Dismiss and a Joinder in

the IUB's Motion for Abstention. (Dkt. No. 16). Sprint filed a separate Response to Windstream's motion, in which it did not oppose the Motion to Intervene but further resisted dismissal and abstention. (Dkt. No. 17). Magistrate Judge Walters granted Windstream's Motion to Intervene on July 14, 2011. (Dkt. No. 21).

For the following reasons, Defendants' Motion for Abstention is granted.

I. BACKGROUND

This case arises from a dispute between Sprint and Iowa Telecom (now Windstream[1]) over the fees that telephone companies pay each other when the customer of one telephone company places a call to the customer of another telephone company. Specifically, this dispute concerns a type of call known as Voice over Internet Protocol ("VoIP") calls, which differ from ordinary telephone calls because they are initially carried by Internet Protocol over a packet-switched network, as opposed to the Time Division Multiplexing protocol of ordinary telephone traffic. In other words, VoIP calls are transported via the Internet, rather than the conventional phone system.

Sprint frequently routes VoIP calls through Windstream for delivery to Windstream's customers.

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[1] Not knowing when Iowa Telecom became Windstream, the Court will simply refer to the entity as Windstream for the purpose of this order.

To connect those calls with its customers, Windstream has billed Sprint for a type of intercarrier compensation known as "intrastate access charges." Initially, Sprint paid these charges without dispute but later decided it was not required to pay them for VoIP calls. Sprint disputed the charges and withheld further payments. In response, Windstream threatened to block calls to and from Sprint customers.

Sprint filed a complaint with the IUB, seeking declaratory relief stating that Sprint was entitled to withhold payment of the disputed charges and that Windstream could not block customer calls because of Sprint's refusal to pay the disputed amounts. Sprint notes in its Complaint (Dkt. No. 1) that it did not ask IUB to determine whether VoIP calls are actually subject to intrastate access charges, a determination that can only be made by the Federal Communications Commission ("FCC"), according to Sprint.

Before the hearing, Windstream informed the IUB that it would not block the calls of Sprint's customers, and Sprint responded by withdrawing its complaint. The IUB allowed Sprint to withdraw its complaint but nevertheless decided to "recast the proceeding to consider Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue." *Sprint Commc'ns Co. v. Iowa Telecommc'ns Services*, Order Granting Motion to Withdraw, Denying Motion for Clarification, Canceling Hearing, and Revising Procedural Schedule, IUB Dkt. No. FCU-2010-0001, 2010 WL 421105 at *7 (Feb 1, 2010). In a February 4,

2011 order, the IUB ruled that Sprint had to pay intrastate access charges for VoIP calls, and it later denied Sprint's motion for reconsideration in a March 25, 2011 order.

On March 25, 2011, Sprint filed complaints in both Polk County District Court and this Court, arguing that the IUB's order is preempted by federal law and seeking declaratory and injunctive relief from that order. The IUB then filed the Motion for Abstention at issue here.

II. DISCUSSION

i. The Law of *Younger* Abstention

The IUB seeks to have the Court abstain from this case under a doctrine first developed in *Younger v. Harris*, 401 U.S. 37 (1971). Generally, Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). However, the Supreme Court has articulated a limited number of abstention doctrines as exceptions to this rule – one being *Younger* abstention. "*Younger v. Harris* . . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The Eighth Circuit has noted that "[t]he moving force behind *Younger* abstention is the promotion of comity between state and federal judicial bodies." *Cedar Rapid Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002). And

this notion of comity requires a system in which the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* (quoting *Younger*, 401 U.S. at 44).

Younger itself involved abstention from a request to enjoin a state criminal prosecution, but the Supreme Court has "expand[ed] the protection of *Younger* beyond state criminal prosecutions, to civil enforcement proceedings . . . and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *New Orleans Public Service, Inc. v. Council of the City of New Orleans, et al*, 491 U.S. 350, 368 (1989); *see also Middlesex*, 457 U.S. at 432 ("The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved . . . .").

As evolved, the *Younger* doctrine provides that a federal court should abstain from exercising jurisdiction when (1) there is an ongoing state judicial proceeding; (2) that state proceeding implicates important state interests; and (3) there is an adequate opportunity to raise any relevant federal questions in the state proceeding. *Cedar Rapids Cellular*, 280 F.3d at 880 (citing *Fuller v. Ulland*, 76 F.3d 957 (8th Cir. 1996)); *see also Middlesex*, 457 U.S. at 432 (1982). And even if these requirements are met, a federal court should not abstain if there is a showing of "bad faith, harassment, or some other extraordinary circumstance that would make abstention

inappropriate." *Younger*, 401 U.S. at 54. Further, abstention may not be appropriate if the state is seeking to enforce a statute that is "flagrantly and patently violative of express constitutional provisions."[2] *Id.* at 53.

The parties agree that a state court proceeding, *Sprint Commcations Co. L.P. v. Iowa Utilities Board*, Polk Country District Court No. CVCV008638 (filed April 25, 2011), is ongoing and that it affords Sprint an adequate opportunity to raise its federal questions. The parties dispute whether the remaining requirements of *Younger* abstention are satisfied. First, Sprint argues that the IUB not only must show that there is an ongoing state judicial proceeding but also that the requested federal relief would interfere with that proceeding. Sprint argues that no interference would result from this case. Second, Sprint contends that the state proceeding does not "implicate[] important state interests" because the ongoing state action is not the type of judicial proceeding that triggers the *Younger* doctrine. Each is discussed below.

ii. Interference With the State Proceeding Is Required

By its plain language, the modern test for *Younger* abstention, as stated in *Middlesex* by the Supreme Court and applied in *Cedar Rapids Cellular* by the Eighth Circuit, does not require that the relief sought in federal court interfere with the ongoing

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[2] The parties agree that neither of these "extraordinary circumstances" exceptions apply to this case.

state action. *See Cedar Rapids Cellular*, 280 F.3d at 880 (citing *Fuller v. Ulland*, 76 F.3d 957 (8th Cir. 1996)); *Middlesex*, 457 U.S. at 432 (1982). Rather, the test – simply read – requires only the existence of an ongoing state proceeding that implicates important state interests and affords adequate opportunity to raise federal questions. *Id.*

Sprint, however, points to *Younger* itself, in which the Supreme Court explained that interference with state action is the touchstone of a federal court's duty to abstain in certain cases. *Younger*, 401 U.S. 44. Moreover, Sprint notes, a careful reading of *Cedar Rapids Cellular* reveals that the Eighth Circuit also requires that the federal action interfere with the state proceeding. Sprint is correct. The Eighth Circuit in *Cedar Rapids Cellular* – having determined that the three *Middlesex* criteria were satisfied but noting that "we must still decide whether it requires abstention in this case" – stated that "[w]e must therefore decide whether the relief sought by the appellants would unduly interfere with ongoing state judicial proceedings." 280 F.3d at 881. Additionally, the Eighth Circuit has stated that, [i]n general, the *Younger* abstention doctrine directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending judicial proceedings." *Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F.3d 475, 481 (citation, internal quotations, and emphasis omitted); *see also Cormack v. Settle-Beshears*, 474 F.3d 528, 532 (8th Cir. 2007) (noting that the *Middlesex* test requires abstention when "the federal action would disrupt an ongoing state judicial proceeding"); *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) ("*Younger*

abstention prohibits a federal court from interfering in pending state civil cases where [the *Middlesex* test is satisfied].").

Further, Sprint notes that multiple other circuits have explicitly held that interference is required under the first *Middlesex* criterion. *See e.g. Foster Children v. Bush*, 329 F.3d 1255, 1276 (11th Cir. 2003); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999). The Supreme Court has also stated that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." *Colorado River*, 424 U.S. at 817 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Thus, some degree of interference with an ongoing state proceeding is necessary to require abstention pursuant to the *Younger* doctrine. Accordingly, the Court must determine whether "the relief sought by [Sprint] would unduly interfere with [the] ongoing state judicial proceeding[]." *Cedar Rapids Cellular*, 280 F.3d at 881.

iii. The Relief Sought Would Interfere With Ongoing State Judicial Proceedings

In this action, Sprint seeks a declaratory judgment stating that the "IUB's Order violates federal law and thus is invalid to the extent that it purports to determine whether Sprint has an obligation to pay intrastate access charges for VoIP traffic." (Dkt. No. 1, at 7). Sprint also seeks "preliminary and permanent injunctive relief

enjoining all defendants from enforcing the IUB's Order to the extent contrary to federal or Iowa law." *Id.* The IUB claims that "[t]he injunctive and declaratory relief Sprint seeks would prematurely halt the ongoing state proceedings for no good reason." (Dkt. No. 5, at 3). Sprint counters that interference with the state proceeding would result only from the collateral estoppel effects of a federal order and urges this Court to adopt the Third Circuit's conclusion that collateral estoppel does not qualify as interference for *Younger* abstention purposes.[3] *See Marks v. Stinson*, 19 F.3d 873, 885 (3d. Cir. 1994).

The Court need not resolve this issue because the requested injunctive relief would do more than collaterally estop the litigation of issues in the state proceeding. The requested relief in this case is exactly the kind declaratory and injunctive interference with state proceedings warned against in *Night Clubs*. 163 F.3d at 481. Relief here for Sprint would enjoin the IUB from "enforcing" its order, which would include litigating the issue in the

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[3] Sprint also cites to *Verizon Maryland Inc. v. Public Service*, 535 U.S. 635 (2002), noting that the Supreme Court "held in that case that 28 U.S.C. § 1331 provides jurisdiction for district courts to grant declaratory and equitable relief to a telecommunications carrier challenging a decision by a state utility commission." (Dkt. No. 17, at 13). However, there was no ongoing state judicial proceeding in *Verizon Maryland*. Verizon filed suit only after it received an unfavorable decision from the Maryland Public Service Commission, and it did not subsequently file a state action in addition to its federal one. *Id.* at 640. Thus, the rationale of *Younger* was inapplicable to that case.

state proceeding. (Dkt. No. 1, at 7). Under these facts, the requested injunctive relief against the IUB is tantamount to an injunction against the state court proceeding. Accordingly, the Court finds that maintenance of this federal action would interfere with an ongoing state judicial proceeding. The first *Middlesex* criterion is satisfied.

iv. The State Proceeding Implicates Important State Interests

Finally, the Court must determine whether the state proceeding implicates interests important to the state of Iowa.

In *NOPSI*, the Supreme Court explained how it evaluates a state's interest:

> [W]hen we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case – which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the state. In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills, but rather its interest in 'carrying out the important and necessary task' of enforcing its criminal laws.

Id. at 365 (quoting *Younger*, 401 U.S. at 51-52). The Court went on to note that NOPSI clearly had a "substantial, legitimate interest in regulating intrastate retail rates" because "[t]he regulation of utilities is one of the most important of the functions

traditionally associated with the police power of the States." *Id.* (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)).

Thus, the state of Iowa has a substantial and legitimate interest in regulating its utilities. At issue, however, is whether that interest is sufficiently implicated by the parallel state court proceeding. Sprint argues that the state proceeding cannot trigger *Younger* abstention because Sprint is the plaintiff in both the state and federal proceedings and because *Younger* applies only when a state defendant seeks equitable relief in federal court as a shield against the state proceeding. Sprint cites to the Sixth Circuit:

> In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally available to the would-be federal plaintiff as a defense in the state proceedings.

Devlin v. Kalm, 594 F.3d 893, 894-95 (6th Cir. 2010) (quoting *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 30 (6th. Cir. 1984)). The Sixth Circuit in *Devlin* concluded that "*Younger* does not apply when the federal plaintiffs are also *plaintiffs* in the state court action and the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts." *Id.* The Third and Eleventh Circuits have reached similar conclusions. *See e.g. Harris v. Pernsley*, 755 F.2d 338, 344 (3d Cir. 1985) (noting the "consistent holdings of

this court that where the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts") (citation and internal quotations omitted); *Wexler v. Lepore*, 385 F.3d 1336, 1340-41 (11th Cir. 2004) ("The *Younger* doctrine does not require abstention merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts.").[4]

However, Sprint's state court action is best characterized as an appeal from the IUB order, and the *Younger* doctrine prohibits a federal court from interfering with the state appellate process. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *NOPSI*, 491 U.S. at 368-69 ("When, in a proceeding to which *Younger* applies, a state trial court has entered judgment, the losing party cannot, of course, pursue equitable remedies in federal district court while concurrently challenging the trial court's judgment on appeal.").

In reaching this conclusion, the Court looks to the Supreme Court's reasoning in *NOPSI*, a case in which an electric utility sought injunctive and declaratory relief in federal district court with respect to the City Council's denial of its request for

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[4] Here, unlike in *Wexler*, Sprint alleges claims based on non-constitutional, federal law, but that does not make the Eleventh Circuit's determination regarding the applicability of *Younger* less persuasive.

a rate adjustment. *Id.* at 352-54. In addition to filing suit in federal district court, NOPSI also filed a petition for review of the City Council's order in Louisiana state court, and the City Council moved for abstention in the federal court action. *Id.* at 357-58.

The City Council argued that the state court action was "a mere continuation of the Council proceeding," akin to an appellate court's review of a lower court decision, which the *Younger* doctrine treats as a unitary and uninterruptible process. *Id.* at 369. The Court assumed, without deciding, that the City Council was correct on this point, noting that prior Supreme Court precedent "suggests, perhaps, that an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final," provided that it is subject to state judicial review. *Id.* at 370 n.4 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986)). However, the Court noted that "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *Id.* at 368. Thus, *Younger* only required abstention in *NOPSI* if the City Council's action was properly considered judicial, rather than legislative or executive. Ultimately, the Court determined that the City Council proceeding was not judicial in nature. *Id.* at 373. The state court proceeding was therefore not akin to the appellate process because it was "no more than a state-court challenge to a completed legislative action." *Id.* In making this determination, the Court noted that the proper characterization of

an agency's action depends "upon the character of the proceedings," *Id.* at 371 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908)), and that "ratemaking is an essentially legislative act." *Id.* (citing *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)).

Although the *NOPSI* Court merely assumed that a state court's review of administrative judicial action is an uninterruptible process under the *Younger* doctrine, this Court finds that assumption to be correct in this case. The Iowa Code mandates a procedure for the judicial review of an Iowa agency order. *See* § 17A.19 ("Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action."); § 17A.19(2) ("Proceedings for judicial review shall be instituted by filing a petition either in Polk county district court or in the district court for the county in which the petitioner resides or has its principal place of business."). Sprint's state court action, therefore, is properly characterized as an appeal from the IUB orders.

And unlike the city council proceeding in *NOPSI*, the IUB orders constitute judicial action. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *NOPSI*, 491 U.S. at 370 (quoting *Prentis*, 29 S.Ct. at 69). Iowa Code § 476.11 provides that the IUB "may resolve complaints, upon notice and hearing, that a utility...

has failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider." In its February 4, 2011 order, the IUB invoked § 476.11 to exercise jurisdiction over the dispute between Sprint and Windstream. (Dkt. No. 1-1, at 11).

The parties submitted briefs on the merits of their claims, which set out both the facts and applicable law. (Dkt. No. 1-1, at 10). The IUB's orders provide a section of background facts, noting that "there are no material factual disputes which would require a hearing," and made conclusions of law based upon the Iowa statutory framework. (Dkt. No. 1-1, at 9). This is judicial activity.[5] Accordingly, the fact that Sprint is the named plaintiff in both the federal and state action does not preclude the state from having substantial interest in the state proceeding.

The Eighth Circuit reached a similar conclusion in *Night Clubs*. 13 F.3d at 478. There, the plaintiff

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[5] The Court notes the somewhat odd procedural posture of the IUB's orders. It granted Sprint's motion to withdraw its complaint "but decided to continue this proceeding in order to give full consideration to the underlying dispute that resulted in the threatened disconnection." (Dkt. No. 1-1, at 8). The IUB "recast the proceeding to consider Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue." (Dkt. No. 1-1, at 9). However, the Court does not judge the wisdom of the IUB's procedure, nor does it find that procedure to undermine the judicial nature of the IUB proceeding. Notably, both parties submitted briefs on the merits after the proceeding was "recast."

appealed an administrative zoning decision first to the state circuit court and then to the Supreme Court of Arkansas. *Id.* While that state appeal was pending, the plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983 in federal district court, naming the city, the members of the city's Planning Commission, and the Planning Commission itself as defendants.

Id. The Eighth Circuit held that the district court correctly determined that all three *Middlesex* criteria were satisfied and that *Younger* abstention was appropriate. *Id.* at 481. Accordingly, the Court does not find the above-cited reasoning of the Third, Sixth, and Eleventh Circuits to be applicable to this case. The state of Iowa has a substantial interest in the regulation of utilities within the state and in the integrity of its procedure for the appeal of IUB orders.

V. CONCLUSION

The Court abstains from this case pursuant to the *Younger* doctrine. This action for declaratory and injunctive relief against the IUB interferes with an ongoing state judicial proceeding. The state proceeding implicates interests important to the state of Iowa, and it affords Sprint an adequate opportunity to raise any relevant federal questions. And because Sprint seeks only declaratory and injunctive relief, the appropriate result is dismissal. *Id.* at 481 (citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)). Having concluded that abstention is required, the Court need not resolve Windstream's additional arguments for dismissal.

Upon the foregoing,

IT IS ORDERED that Defendants' Motion for Abstention is granted and that the Plaintiff's Complaint is dismissed. The Clerk shall enter judgment for the Defendants.

DATED this 1st day of August, 2011.

John A. Jarvey
United States District Judge
Southern District of Iowa

APPENDIX C

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

Sprint Communications Company, L.P.,
Complainant

Docket No. FCU-2010-0001

v.

Iowa Telecommunications Services, Inc., d/b/a/ Iowa Telecom,
Respondent.

ORDER DENYING APPLICATION FOR RECONSIDERATION AND MOTION FOR STAY

(Issued March 25, 2011)

BACKGROUND

On February 4, 2011, the Utilities Board (Board) issued an "Order" in this proceeding determining that certain intrastate interexchange Voice over Internet Protocol (VoIP) traffic delivered by Sprint Communications Company L.P. (Sprint) to Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom, now known as Windstream Iowa Communications, Inc., or Windstream[1]), is

[1] Pursuant to a reorganization proceeding identified as Docket No. SPU-2009-0010, Iowa Telecom merged with Windstream

subject to the Board's jurisdiction and Iowa Telecom's intrastate access charges. The Board ordered Sprint to pay Windstream amounts owed for unpaid access charges by March 6. The Board issued its Order after considering briefs filed by the parties and the Consumer Advocate Division of the Department of Justice (Consumer Advocate).

A detailed procedural history of the proceeding is provided in the Order. Briefly, the proceeding began on January 6, 2010, when Sprint filed a complaint against Iowa Telecom alleging that Iowa Telecom was assessing incorrect charges for routing and handling Sprint's VoIP calls. Sprint alleged it had properly disputed the charges and withheld the disputed amounts, as permitted by Iowa Telecom's access tariffs. Sprint asked the Board for emergency relief, alleging that Iowa Telecom was going to cease providing facilities for Sprint's traffic beginning on January 8, 2010, effectively blocking calls.

Iowa Telecom filed a preliminary answer to the Complaint on January 7, 2010, stating it would not discontinue access service to Sprint as long as Sprint remained current on newly-billed access charges. On January 19, 2010, Iowa Telecom filed an answer and motion for injunctive relief stating it had assessed the appropriate intrastate access charges under its tariff. Iowa Telecom denied that its access services tariff allows continued withholding of payment after

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Corporation and was renamed Windstream Iowa Communications, Inc. Throughout the February 4, 2011, Order, the Board referred to Iowa Telecom, the name of the company before the merger went into effect.

a dispute has been denied. Iowa Telecom asked the Board to issue an order requiring Sprint to immediately pay to Iowa Telecom all withheld intrastate switched access charges invoiced to date and in the future where Iowa Telecom has denied Sprint's billing dispute and prohibiting Sprint from setting off funds payable to Iowa Telecom for other services provided to Sprint or Sprint affiliates.

On January 22, 2010, the Board issued an order docketing Sprint's complaint as Docket No. FCU-2010-0001 and setting an expedited procedural schedule. On January 27, 2010, Sprint filed a motion to withdraw its complaint, a motion for clarification, and a contingent motion to revise the procedural schedule. With respect to its request to withdraw the complaint, Sprint argued that the only relief it requested was for the Board to prohibit Iowa Telecom from discontinuing service and that the specific claims in its complaint were no longer ripe. Acknowledging that the parties' potential call blocking dispute is likely to recur, Sprint asked the Board to require Iowa Telecom to clarify whether it is raising counterclaims and, if so, to state those claims more clearly. Sprint asserted that the only issue in dispute in this proceeding is the propriety of call blocking or threats to block calls and argued that this is a legal issue that can be resolved without a hearing. Sprint urged the Board to move directly to briefing rather than requiring testimony and hearing.

On January 28, 2010, Iowa Telecom filed a response resisting Sprint's motions. Iowa Telecom argued the Board must consider the underlying

merits of the parties' billing dispute in the context of the expedited proceeding already underway. Iowa Telecom rejected Sprint's assertion that the issues involved in this controversy were not ripe and stated the matter was likely to recur quickly if Sprint were allowed to withdraw its complaint. Iowa Telecom argued it would be unfair to allow complainants to invoke emergency injunctive relief but avoid consideration of the merits of the dispute. Pointing to Iowa Code § 17A.18A for support, Iowa Telecom argued that the General Assembly intended that an agency's order for emergency relief be followed by a full determination of the merits of the dispute. Iowa Telecom asserted it had a right to be heard on all of the merits of Sprint's complaint and that this controversy should be resolved promptly. Iowa Telecom urged the Board to continue the expedited schedule already in place.

On February 1, 2010, the Board issued an order granting Sprint's motion to withdraw its complaint, denying Sprint's motion for clarification, and revising the procedural schedule. The Board explained that both parties acknowledged there was an underlying dispute about the parties' rights and obligations with respect to the application of tariffed charges to certain telecommunications traffic. The Board allowed Sprint to withdraw its complaint but decided to continue this proceeding in order to give full consideration to the underlying dispute that resulted in the threatened disconnection. The Board explained that the docket would remain open, but not under an expedited procedural schedule, and that the Board would recast the proceeding to consider Iowa Telecom's claims about the propriety

of Sprint's withholding of access charge payments for the traffic at issue. (February 1, 2010, order, p. 7.) The Board did not agree with Sprint's assertion that Iowa Telecom had not identified the issues for the Board's consideration with sufficient clarity and did not require Iowa Telecom to file any additional claims or clarification. The Board stated that the issues as expressed in the parties' filings to date relate generally to the parties' rights and obligations (as provided in federal law, state law, and Iowa Telecom's tariff) regarding intrastate switched access charges, including carrier common line charges (CCLCs), and particularly as applied to VoIP traffic, including non-nomadic VoIP traffic. Related issues include a party's right to withhold payment for disputed charges and a party's right to disconnect service for non-payment. (*Id.*) The Board noted that the issues between the parties relate to what rules apply to the traffic in question, not the amount of traffic subject to charges, and that the issues in this case were legal issues with no material factual disputes which would require a hearing. (Id.) The Board required simultaneous briefs and reply briefs from the parties. No party objected to this procedure. On March 1, 2010, Consumer Advocate, Sprint, and Iowa Telecom filed initial briefs. On March 30, 2010, Sprint and Iowa Telecom filed reply briefs.

As noted above, the Board issued its decision in this docket on February 4, 2011, determining (among other things) that intrastate interexchange VoIP calls are subject to the Board's jurisdiction and to intrastate access charges. The Board also decided that Sprint acted inappropriately when it effectively withheld amounts that were not disputed (Order, pp.

68-71) and that Iowa Telecom was not justified in planning to disconnect Sprint without Board approval under the unusual circumstances of this case. (Order, pp. 77-79.)

Sprint's Application for Reconsideration and Motion to Stay

On February 23, 2011, Sprint filed with the Board an "Application for Reconsideration" and a "Motion to Stay Pending Reconsideration." In part, Sprint asked the Board to stay the payment obligations under the February 4, 2011, Order until the Board makes a determination on Sprint's request for reconsideration. On February 28, 2011, Windstream objected to the application for reconsideration and the motion for a stay. In an order issued on March 4, 2011, the Board denied Sprint's motion to stay the payment obligations.

Sprint's application for reconsideration focuses primarily on the "Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking" issued by the Federal Communications Commission (FCC) on February 9, 2011, *In re: Connect America Fund*, WC Docket No. 10-90, FCC-11-13 (FCC NPRM). According to Sprint, the FCC proposes in the NPRM to determine the appropriate obligations and compensation for interconnected VoIP traffic and to move away from the traditional tariffed access charge method of compensation for such traffic. Sprint contends it will be harmed if it is required to pay the traditional intrastate access rates for the traffic at issue in this proceeding.

Sprint characterizes the FCC NPRM as a "significant new development." (Application, p. 1.) Sprint notes that the FCC has classified resolution of the VoIP compensation issue as a "Near Term" or "Immediate" action. (Application, p. 2.) According to Sprint, the FCC suggests that the near term provisions will be ready and effective in 2012. Sprint argues it would be prudent for the Board to wait to assign a jurisdiction to the VoIP traffic at issue in this proceeding until the FCC makes its decision. Sprint argues that the proper solution for disputes involving compensation for VoIP traffic will come from the FCC.

Sprint also argues the Board's conclusion regarding compensation for VoIP does not necessarily follow from the Board's determination that the traffic at issue was jurisdictionally intrastate. According to Sprint, because VoIP uses different technology than traditional circuit switched traffic, it uses network resources more efficiently. Sprint contends that the Board did not address the cases in Sprint's briefs that discussed the issue of an appropriate intercarrier compensation structure separately from the jurisdictional issue. Sprint emphasizes that most of the FCC's proposals for immediate application involve compensation methods other than traditional tariffed intrastate access. Sprint suggests that the FCC's stated intent to move away from the current intercarrier compensation system is consistent with Iowa Code § 476.95(3), which provides that the rates for incumbent local exchange carriers (including access rates) should be moved toward costs, with implicit subsidies removed, and § 476.95(4), which allows the

Board to respond with flexibility to changes in the industry. Sprint states that the Board should either reopen the issue of compensation for VoIP traffic and stay its decision until the FCC rules on its choice of compensation regimes for VoIP or reopen the issue for further evidence on a reasonable rate for VoIP.

Sprint suggests there is precedent for the Board's consideration of a different rate for VoIP traffic, noting that in the High Volume Access Services rule making proceeding, Docket No. RMU-2009-0009, the Board recognized that the nature of the traffic at issue in that proceeding was different from traffic that had historically been subject to access tariffs and established a procedure for setting different rates for that traffic.

On the question of taking evidence, Sprint states that the determination of the jurisdictional nature of the VoIP traffic was a threshold legal issue in this proceeding and that the Board's determination of jurisdiction was made only on the basis of legal briefs. (Application, p. 3.) Sprint argues that the Board should have resolved only that issue in its order. According to Sprint, the other issues decided by the Board in the February 4 Order were not "threshold legal issues" and require the presentation of evidence and specific arguments directed at those issues.

Sprint contends that the Board erred both in reaching and resolving the Accounts Payable Debit Balance (AP Debit Balance) issue. Sprint asserts there is no language in Iowa Telecom's tariffs that answers whether future undisputed amounts can be applied against an outstanding balance of disputed

amounts or whether the undisputed amounts must be paid. Further, Sprint asserts that because the Board ruled that all outstanding amounts must be paid, the AP Debit Balance issue was moot and need not have been addressed. Sprint also states that the issue was moot because Sprint had agreed to pay current undisputed amounts to eliminate the emergency aspect of the case and did not resume the practice of retaining undisputed amounts to apply against the disputed amounts. Sprint argues that the use of the AP Debit Balance tool, its accounting legitimacy, and its importance in dispute resolution are all issues which require a factual record that was not present at the time of the Board's Order. Sprint asserts that for these reasons the Board should reconsider its Order and delete decisions on issues that are not related to the legal questions about VoIP jurisdiction.

Sprint also asks the Board to grant reconsideration of its Order to allow a reasonable time for the parties to brief the issue of the impact of the FCC NPRM and other decisions that post-date the briefs filed in this case. Sprint suggests additional briefing would update the arguments on the jurisdiction and compensation issues.

Windstream's Objection

On February 28, 2011, Windstream filed an objection to Sprint's application for reconsideration and the motion for a stay. Windstream states that the Board need not reopen the proceeding to hear evidence, that the Board's ruling on the validity of Sprint's payment withholding practices was not improper, and that the Board should not stay its

decision. Windstream suggests that Sprint is welcome to advocate for changes to the intercarrier compensation regime on a prospective basis but cannot justify not paying for services already provided under current law based on expected or hoped for changes to the compensation regime which have not yet been enacted.

More specifically, Windstream asserts that the Board's conclusion that Windstream's tariff applies to the VoIP traffic at issue in this proceeding was correct. Windstream points out that Sprint's only specific argument about the Board's legal reasoning on the issue about whether the tariff applies to the VoIP traffic is that the Board did not address certain cases cited by Sprint which discussed compensation separately from jurisdiction. To refute Sprint's assertions about the Board's consideration of the compensation issue, Windstream refers to the Board's discussion of its rules at 199 IAC 22.14 and 38.6 (such as Order, pp. 12, 43-45), confirming that the Board separately addressed the compensation issue. Windstream reviews the Board's discussion about the application of access charges to intrastate traffic and the Board's explanation about why reciprocal compensation would not be an appropriate compensation mechanism for the traffic involved in this proceeding. (Windstream Objection, pp. 3-4, citing Order, pp. 12, 45.) Windstream also notes that the Board considered the *Time Warner Declaratory Order*[2] and concluded it would not be reasonable to

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[2] *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of*

read that decision as requiring a reciprocal compensation arrangement for the VoIP traffic at issue, specifically rejecting Sprint's suggestion to do so. Windstream agrees with the Board's conclusion on that point.

Windstream does not agree that further briefing is necessary or would be useful, noting there will always be new developments in the law. Windstream also points out that while this case was pending, Sprint could have asked for the opportunity to brief any new developments in the law, but did not do so.

In response to Sprint's arguments that the Board should reopen the proceeding to receive evidence, Windstream argues that Sprint's call for an evidentiary hearing comes too late. Windstream points out that Sprint has been on notice for a year that the Board's order responding to the briefs could result in Sprint having to repay the withheld funds. Windstream recounts that in its answer and motion for injunctive relief filed on January 19, 2010, Windstream asked the Board to order Sprint to immediately pay all withheld intrastate switched access charge invoices. Sprint's subsequent motion to dismiss Windstream's motion was rejected by the Board in its February 1, 2010, "Order Granting Motion to Withdraw, Denying Motion for Clarification, Canceling Hearing, and Revising Procedural Schedule," in which the Board stated it would "recast the proceeding to consider

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1934, As Amended, To Provide Wholesale Telecommunications Services to VoIP Providers, WC 06-55, DA 07-709, 22 FCC Rcd. 3513, Rel. March 1, 2007.

[Windstream's] claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue."

Windstream also refers to the Board's statement in that order that the issues in the case appeared to be legal issues and there were no material factual disputes that would require a hearing. Again, Windstream argues that Sprint could have objected to the scope of the issues the Board explained it would consider in the briefs, but it failed to make that objection. Further, once Sprint saw Windstream's briefs, there could have been no doubt that there was a possibility that the Board could order Sprint to pay Windstream based on the briefs. Windstream argues that because Sprint permitted the Board to decide the case on briefs, failed to object to an order based on those briefs alone, never raised a claim of uncertainty as to which facts the briefs would apply, and has not offered a hint as to what relevant evidence it would submit if the proceeding is reopened, the Board, Consumer Advocate, and Windstream should not be required to expend additional resources in this case.

Windstream disputes Sprint's objection to the Board's conclusion regarding Sprint's AP Debit Balance practices as moot and Sprint's request that the Board rescind its conclusions regarding the AP Debit Balance. Windstream states that in recasting the proceeding in its February 1, 2010, order, it was clear the Board would consider a number of issues raised by the parties.

Finally, Windstream contends the FCC NPRM does not justify staying the effectiveness of the Board's Order. Windstream argues that the FCC has in the past invited state regulatory commissions to make their own conclusions regarding the application of intrastate access charges to VoIP traffic, as the Board recognized in its Order. According to Windstream, it is clear that the FCC is seeking comments in the NPRM about what compensation should apply to VoIP traffic, but has not made any tentative conclusions about the issue. Thus, the only relevant development with respect to VoIP compensation signified by the NPRM is that the FCC may issue an order on the matter sooner than it issues an order on other intercarrier compensation issues it is considering. Windstream suggests this development has procedural significance, but does not relate to the validity of the Board's Order. Windstream's position is that the FCC would be correct to decide that intrastate access rates apply to the traffic at issue in this proceeding and to apply that decision retroactively, but observes there is no guarantee that the FCC will apply whatever decision it reaches retroactively. Windstream notes that the FCC seeks comment regarding whether any particular proposals to reform compensation for VoIP traffic would be applied retroactively. (Windstream Objection, p. 7, citing FCC NPRM at ¶ 614.)

Consumer Advocate's Answer

On March 9, 2011, Consumer Advocate filed an answer to Sprint's application for reconsideration. Noting that Sprint seeks reconsideration of the

Board's Order in light of the FCC NPRM, Consumer Advocate states that in the NPRM, the FCC acknowledges that while it has sought comment about the appropriate compensation for VoIP, it has not reached a decision, thereby creating uncertainty and leading to billing disputes and litigation. (Consumer Advocate Answer, p. 2, citing FCC NPRM ¶¶ 604, 610.) Consumer Advocate's position is that the release of the FCC NPRM is not reason to stay or vacate the Board's Order. Consumer Advocate observes that disputes over VoIP compensation will likely continue until the FCC provides a definitive answer and that answer is tested in the courts. Consumer Advocate suggests it may be some time before there is certainty on this issue, despite the FCC's stated intent to move quickly. Consumer Advocate emphasizes that the FCC has cautioned the industry that in the interim, nothing in the NPRM "should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic." (Consumer Advocate Answer, p. 3, citing NPRM ¶ 614.) According to Consumer Advocate, the Board's Order corrected Sprint's unilateral decision in 2009 to stop paying intrastate access charges to Iowa Telecom and the Order should not be stayed pending final action by the FCC in its NPRM.

Further, Consumer Advocate suggests that quick action by the FCC does not guarantee that any decision will apply to intrastate VoIP intercarrier compensation. Consumer Advocate notes that the Board's Order is limited to intrastate access charges. It appears to Consumer Advocate that Sprint

anticipates that the FCC will preempt state action regarding intrastate VoIP intercarrier compensation, based on Sprint's assertion that the FCC intends to take control of the issue and offer a "global" resolution. (Consumer Advocate Answer, p. 3, citing Sprint's Application, p. 2.) Consumer Advocate argues that Sprint's interpretation of the FCC's intentions is not supported by the FCC's language in the NPRM. For example, Consumer Advocate points out that the FCC asks for comment on possible compensation systems which recognize the jurisdiction of the states over intrastate access charges, the reach of the FCC's own authority over VoIP intercarrier compensation mechanisms, and whether any final decision should be applied retroactively. (Consumer Advocate Answer, pp. 3-4, citing FCC NPRM, ¶¶ 614-619.)

Consumer Advocate recalls that in the Order, the Board discussed the decision by another state regulatory commission not to refrain from acting on the issue of VoIP compensation while it waited for a possible future order from the FCC which may or may not preempt the state's authority. (Consumer Advocate Answer, p. 4, citing Maine PUC Order, which is cited in the Order, pp. 59-62 and elsewhere.) Consumer Advocate urges the Board not to "preemptively preempt" its Order in this case in anticipation of some future FCC order which may or may not preempt the Board's authority over intrastate VoIP traffic.

Consumer Advocate addresses Sprint's request to reopen the proceeding for further evidence on a reasonable rate for VoIP traffic in the event the

Board decides not to stay or vacate its Order. Consumer Advocate's position is that the issue of whether the intrastate access charges in Windstream's tariff are reasonable or consistent with the FCC's policy statements on the matter, or with Iowa Code § 476.95, is not properly before the Board. According to Consumer Advocate, if Sprint raised these issues in its original complaint filed on January 6, 2010, Sprint withdrew its complaint on January 27, 2010. Consumer Advocate notes that the Board continued the proceeding to allow consideration of Windstream's claims about Sprint's withholding of payments for access charges for VoIP traffic. Consumer Advocate notes that in Sprint's briefs, Sprint argued that the Board's jurisdiction over intrastate VoIP traffic had been preempted and that access charges should not apply to VoIP traffic, but did not argue that the access charges in Windstream's access tariff were unreasonably high. Consumer Advocate refers to *MCImetro Access Transmission Serv., LLC, d/b/a Verizon Access Transmission Serv., et al., v. Iowa Tel. Serv., Inc., d/b/a Iowa Telecom, et al.*, Docket No. FCU-08-6, the proceeding in which Windstream's access tariffs were revised pursuant to a settlement of a complaint filed by Verizon. Consumer Advocate suggests Sprint is free to file a complaint under Iowa Code § 476.11 about the reasonableness of the terms of interconnection with Windstream. Consumer Advocate emphasizes, however, that the issues raised by Sprint in this case focused on whether Windstream could lawfully charge intrastate switched access rates for Sprint's intrastate VoIP traffic, and the Board ruled that the switched access

tariff rate applied to the traffic. Consumer Advocate urges the Board to deny Sprint's application for reconsideration.

Discussion

In an order issued on March 4, 2011, the Board denied Sprint's request to stay the deadline by which it was to pay Windstream amounts as directed in the February 4 Order. The Board will now address the rest of the requests in Sprint's application for reconsideration. Sprint's application focuses on the recent FCC NPRM, which Sprint characterizes as a "significant new development" that warrants both reconsideration and stay of the Board's Order. In light of the FCC NPRM, Sprint asks the Board to (1) refrain from assigning a jurisdiction to the traffic at issue; (2) to reopen the proceeding for consideration of the issue of how VoIP traffic is to be compensated and to stay its decision until the FCC specifies a compensation regime for VoIP; and (3) alternatively, Sprint asks the Board to reopen the issue for further evidence on a reasonable rate for VoIP traffic. If the Board is not willing to stay its Order, Sprint asks the Board to accept reconsideration to allow additional briefing to update the arguments on the threshold question of jurisdiction and compensation for VoIP traffic. Sprint also asks the Board to reconsider its Order and delete issues unrelated to the legal question of VoIP jurisdiction.

The Board has reviewed Sprint's requests and the responses filed by Windstream and Consumer Advocate. The Board will first consider Sprint's requests relating to the FCC NPRM. The FCC discusses intercarrier compensation obligations for

VoIP in Section XV of the NPRM, titled "Reducing Inefficiencies and Waste by Curbing Arbitrage Opportunities." In that section, the FCC seeks comment on how to reduce three specific arbitrage opportunities. One arbitrage opportunity has resulted from the fact that the FCC "has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic"; the FCC acknowledges that the resulting uncertainty has led to billing disputes and litigation. (FCC NPRM, ¶ 604.) The other two arbitrage opportunities discussed in Section XV relate to "phantom traffic" and "access stimulation." (FCC NPRM, ¶¶ 605, 606.) The FCC proposes rules to address phantom traffic and access stimulation, but does not propose rules on the subject of intercarrier compensation for VoIP. Instead, the FCC seeks comment on five possible options for the treatment of VoIP traffic: (1) immediate adoption of Bill-and-Keep for VoIP; (2) immediate obligation to pay VoIP-specific intercarrier compensation rates; (3) obligation to pay intercarrier compensation as part of future glide path; (4) immediate obligation to pay existing intercarrier compensation rates; and (5) alternative approaches. (FCC NPRM, ¶¶ 615-619.)

The Board agrees with Sprint that the NPRM is a significant development. The Board reads the NPRM as marking the starting point of perhaps the FCC's most focused consideration to date of the issues relating to compensation for VoIP traffic. However, the Board does not expect that the results of the FCC's consideration will come quickly enough to warrant staying the Board's order; thus, the Board

does not find that the NPRM, in and of itself, justifies reconsideration or stay of the Board's order. It appears that Consumer Advocate and Windstream are more realistic in their assessment of how soon the FCC will specify a compensation regime for VoIP traffic. Consumer Advocate notes that it will take some time to reach a conclusive answer, recognizing that the FCC's decision will likely be tested in the courts, and Windstream suggests the only relevant development is procedural, i.e., that the FCC's answer on intercarrier compensation for VoIP may come sooner than its decision on other compensation issues.

Moreover, as noted by Consumer Advocate, the FCC gives explicit guidance on the question of what should happen while awaiting the FCC's decision on intercarrier compensation for VoIP. At ¶ 614 of the NPRM, the FCC emphasizes that nothing in the NPRM

> should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic.

In its Order, the Board determined that the disputed VoIP traffic was subject to the existing commercial arrangements between Iowa Telecom and Sprint as expressed in Iowa Telecom's lawful intrastate access tariffs. The Board will not disrupt those arrangements on the basis of speculation about what the FCC's final decision might be. The FCC has included both the Board's chosen compensation mechanism (Sprint was obligated to pay existing intercarrier compensation rates, i.e., intrastate

access charges) and the one proposed by Sprint (a reciprocal compensation arrangement) in its list of options. It is not yet clear which option the FCC will select and whether the chosen mechanism will apply retroactively or prospectively. The Board will not reconsider or stay its Order on the basis of the FCC NPRM.

Sprint also asks the Board to either reopen the issue of compensation for VoIP and stay its Order until the FCC specifies a compensation regime for the traffic or to reopen the issue for further evidence on a reasonable rate for VoIP traffic. As the Board has already discussed, a stay is not appropriate because the FCC has indicated only that it is considering the issues and alternative treatments for VoIP traffic; it has not yet made any changes and may adopt any of several alternatives. As noted by Consumer Advocate, the Board's Order corrected the unilateral action Sprint took when it decided to stop paying intrastate access charges for the VoIP traffic in question. And as recognized by Windstream, the Board's order restored the arrangements between the parties to what is permitted and required by current law. Staying the Order until the FCC specifies a compensation regime would renew the dispute over whether the intrastate access charges apply to the traffic in question and would be based on speculation, not on current law.

As the Board stated in its recent order denying Sprint's request to stay its payment obligations in this proceeding, applying the traditional test for whether to stay an order involves consideration of four factors. The first involves consideration of the

movant's likelihood of success on the merits of its position. The second is whether the movant will suffer irreparable harm if a stay is not granted. The third is whether the opposing party will be harmed by granting a stay. Finally, the fourth factor requires consideration of the public interest. *Teleconnect Co. v. Iowa State Commerce Commission*, 366 N.W.2d 511, 513 (Iowa 1985).

The first factor does not support granting a stay. Sprint attempts to predict the outcome of the FCC NPRM, but the NPRM is a preliminary document and contains no tentative conclusions to indicate the FCC's determination of the compensation mechanism for VoIP traffic. Thus the NPRM does not establish a likelihood that Sprint's position will prevail, i.e., that the FCC will rule as Sprint expects. Even if it did, there is no indication in the NPRM that the FCC ruling will have retroactive effect. It is more likely that it will be effective prospectively only, which does not support a stay at this time. The first factor, then, is neutral at best.

Second, the Board finds that Sprint will not suffer irreparable harm if the motion for a stay is denied. If Sprint prevails in the end, any alleged burdens associated with the current access charge regime will be removed, and the FCC will either relieve Sprint from current obligations prospectively or retroactively. If the FCC's action has retroactive effect, Sprint may be entitled to refunds from Windstream. Sprint has not shown that refunds would not be an adequate remedy. The second factor does not support granting a stay.

Third, Windstream could suffer some degree of harm if a stay is granted. Granting a stay could otentially renew the debate about Sprint's obligations under current law. The Board's Order resolved questions about Sprint's obligations under Windstream's tariffs and granting a stay could disrupt the certainty that the Order brought to the commercial arrangements between the parties. The third factor does not support granting the motion for stay.

Finally, the public interest would be harmed by granting a stay. The Board has determined that the disputed telephone traffic is subject to access charges under current law. As the Board noted in its March 4 order denying Sprint's motion to stay its payment obligations, the public interest is advanced by the existence of an interconnected and functional system for the exchange of long distance calls between interexchange carriers and local exchange carriers, and that system requires that carriers compensate one another according to the applicable statutes, rules, and tariffs. Again, the fourth factor does not support granting the motion to stay pending the FCC's decision.

Based upon this analysis of the four-factor test, and for the reasons discussed above, the Board will deny the motion for stay. The Board will not stay its Order to await a final decision from the FCC.

With respect to Sprint's request for reconsideration of certain aspects of the Board's Order or to reopen the proceeding to receive certain evidence, the Board notes that Sprint did not cite the Board to any explicit standards in Iowa law which

would guide the Board's decision whether to grant or deny such reconsideration or rehearing. Iowa Code § 17A.16(2) generally provides for applications for rehearing in contested case proceedings, but does not specify when rehearing should be granted. Instead, it provides that a party seeking rehearing must state "the specific grounds for the rehearing and the relief sought ... ." Iowa Code § 476.12 gives the Board specific authority to grant or refuse an application for rehearing, but does not specify the standards the Board should apply. The Board's rules at 199 IAC 7.27 also do not specify a standard.

Rehearing can be appropriate in order to hear new or additional evidence, if there is good reason for the failure to present the evidence at the regular hearing.[3] Rehearing is also appropriate in order to consider new or additional legal argument or to correct legal error.[4] However, rehearing is not required when the new or additional evidence or argument supports the original decision.[5] The Board will apply those standards as it considers Sprint's application for reconsideration and Sprint's request that the Board reopen this proceeding to receive certain evidence.

Sprint asks the Board to reopen the issue for to receive evidence regarding a reasonable rate for VoIP

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[3] *Shaaf v. Iowa Board of Medicine*, 2009 WL 5126252 (Iowa App. 2009).

[4] *Windway Technology, Inc. v. Midland Power Coop.*, 696 N.W.2d 303 (Iowa 2005).

[5] *S.E. Iowa Coop. Elec. Assoc. v. Iowa Utilities Board*, 633 N.W.2d 814, 822 (Iowa 2001).

traffic. Sprint appears to fault the Board's Order for failing to consider cases cited by Sprint in its briefs which Sprint contends discussed the issue of compensation for VoIP traffic separately from the jurisdictional question. Because Sprint did not name the cases it believes the Board overlooked, the Board cannot address the point in detail. However, the Board rejects any implication that the Order does not contain sufficient discussion of the compensation issue. As Windstream explains in its objection, the Board specifically discussed Sprint's proposal that the VoIP traffic at issue in this proceeding be subject to a reciprocal compensation arrangement instead of access charges. Sprint asked the Board to order a reciprocal compensation arrangement for the traffic (as opposed to access charges) as ordered by the FCC in the *Time Warner Declaratory Order*. The Board rejected that request and, in doing so, provided ample discussion of the compensation issues raised by Sprint. The Board distinguished the *Time Warner Order*, a source for support of Sprint's assertion that reciprocal compensation would be appropriate for the traffic at issue, and discussed whether reciprocal compensation was appropriate for the traffic at issue under the Board's rules.

In its application for reconsideration, Sprint suggests there is precedent for the Board to set a separate rate that would account for what Sprint contends are the characteristics of VoIP traffic, a rate other than traditional access charge rates. Sprint refers to the Board's proceeding in Docket No. RMU-2009-0009, *In re: High Volume Access Services* (the HVAS proceeding). That comparison is not appropriate. In the HVAS proceeding, the Board

expressly sought to determine the appropriate rate for a particular type of traffic. In the present case, the Board made it clear that it would focus on whether the rates in Iowa Telecom's intrastate access tariff applied to the traffic in question. Because the reasonableness of those rates was not raised by Sprint and was never in consideration, the issue is not appropriate for rehearing.

The Board finds that Sprint has failed to present any argument that would justify reopening this proceeding for purposes of determining a separate rate to be applied to the VoIP traffic in question. The Board will not reconsider its Order on the subject of compensation for the VoIP traffic involved in the proceeding or reopen the record to receive evidence relating to the issue of a reasonable rate for VoIP traffic. It would not be appropriate to grant rehearing for the purpose of receiving evidence about a specific rate for the traffic in question when the proceeding was never intended to consider that issue. Nor does the Board find that Sprint has identified any legal error in the Board's Order which must be corrected by rehearing.

Sprint is not without recourse, but its option is not in this proceeding. As suggested by Consumer Advocate, if Sprint wants to object to the rates included in Windstream's tariffs, it can file a complaint with the Board under Iowa Code § 476.11. Or, Sprint could request the Board to initiate a separate rule making proceeding in which the Board could consider an appropriate rate for the traffic at issue here.

Nor will the Board reconsider its Order to allow briefing on the arguments on the legal questions about the Board's jurisdiction and issues relating to compensation for VoIP traffic. The FCC has confirmed in the NPRM what the Board concluded in the Order – that the FCC had not yet classified VoIP as an information service subject to exclusive federal jurisdiction, and may never do so. In discussing the option of determining that interconnected VoIP traffic is subject to the same intercarrier compensation charges (including intrastate access charges) as other voice traffic, the FCC explains that this outcome could result if the FCC classifies interconnected VoIP as telecommunications services. The FCC acknowledges that "the Commission thus far has not addressed the classification of interconnected VoIP services" and seeks comment on whether it could reach this outcome without making such a classification. (FCC NPRM, ¶ 618.) In light of this statement from the FCC that it has not yet made a decision as to whether interconnected VoIP traffic is an information service or a telecommunications service, the Board does not believe that further briefing on questions about the Board's jurisdiction to determine the status of the VoIP traffic at issue or about compensation for that traffic would be instructive. The relevant analysis of the jurisdictional and compensation issues will come from the FCC as it considers the comments received in the NPRM and when it decides the issue. The Board will deny Sprint's request to reconsider its Order to allow additional briefing.

Next, the Board will address Sprint's request that the Board reconsider its Order and delete issues

unrelated to the question of jurisdiction and Sprint's allegation that the Board erred by reaching the AP Debit Balance issue[6] and in its resolution of that issue. The Board does not agree with Sprint's assertions.

Sprint appears to claim to be surprised by the reach of the Board's decision. Sprint's current understanding of what issues were to be considered by the Board in this proceeding (and thus which issues were likely subjects of any Board order) does not appear to match the understanding of the Board, Consumer Advocate, or Windstream. The Board's orders in this proceeding clearly identified the scope of the issues and the briefs of all participants demonstrate an understanding of what issues were involved, and Sprint's AP Debit Balance accounting practice was one of those issues.

In its February 1, 2010, order, the Board decided to continue the proceeding that had started with Sprint's complaint even after the complaint was

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[6] In its Initial Brief, at unnumbered pages 4-5, Sprint explained that an AP Debit Balance "may occur when Sprint disputes inappropriate/unlawful amounts that it has overpaid for a past period. Sprint puts the value of those amounts for which Sprint was overcharged and was entitled to withhold on its books as an amount owed from Iowa Telecom as amounts wrongfully paid. If the overpayment amounts are substantial, they may be larger than the charges characterized by Iowa Telecom as undisputed charges in the current period. In that circumstance, Sprint enters the current undisputed charges in the Accounts Payable system to reduce the overpayment amounts, but the overpayment amounts may still remain, meaning that there is no current account payable amount owed to Iowa Telecom."

withdrawn because the parties acknowledged there is an underlying dispute about their rights and obligations regarding the application of tariffed charges to the VoIP traffic at issue. The Board stated it would give full consideration to that underlying dispute, including Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the disputed traffic. The Board explained that the issues appeared to relate to the parties' rights and obligations with respect to the disputed traffic established in state and federal law and in Iowa Telecom's tariffs. The Board specifically stated that a related issue was a party's right to withhold payment for disputed charges. For the Board to be able to consider whether a party was properly withholding payment for disputed charges, it would necessarily have to reach the issue of whether Sprint's AP Debit Balance practice was permissible under the tariff. Further, Sprint specifically asked the Board to address the issue, making its assertion that the Board erred in reaching the issue hard to accept. In its Initial Brief, Sprint asked the Board to "find that Sprint acted appropriately, and that its use of an AP Debit Balance did not provide justification for Iowa Telecom to threaten unilateral blocking of live traffic." (Sprint Initial Brief, unnumbered page 7.) Sprint also argued in its briefs that the AP Debit Balance was permitted by Iowa Telecom's tariff. Having raised the issue and having asked the Board for a resolution of the issue, Sprint cannot now claim that the Board improperly reached the issue.

With respect to Sprint's objection to how the Board decided the issue, the Board finds that

Sprint's application does not raise any new arguments about the legitimacy of the AP Debit Balance practice. The Board will not reconsider its Order to delete or otherwise modify any of its conclusions relating to Sprint's use of the AP Debit Balance. The Board found that because Iowa Telecom's tariff includes language regarding the treatment of disputed amounts, it contemplates the payment of undisputed amounts. The Board also observed that timely payment of undisputed amounts is a common practice in the industry. The Board concluded that Sprint acted inappropriately by using the AP Debit Balance account which, in effect, amounted to withholding of amounts Sprint had not disputed.

The Board considered the AP Debit Balance issue because it related to the underlying dispute between the parties which prompted Sprint's complaint about Iowa Telecom's threat to discontinue providing facilities for the VoIP traffic in question. The issue was clearly identified by the Board in its orders and the parties recognized the issue as one to be decided because they discussed it at length in their briefs. The Board finds that Sprint has failed to identify any new argument that would justify reconsideration of the Board's Order on this issue.

Finally, there is Sprint's claim that it is entitled to rehearing to present evidence on "the use of, the accounting legitimacy of, and the importance of [the AP Debit Balance] tool in dispute resolution ... ." (Application, p. 4.) The short answer to that claim is that Sprint had the opportunity to present that evidence and chose not to use it. Having made its

choice, Sprint must accept the consequences. Sprint is not entitled to a second bite at the evidentiary apple.

The procedural history of this case is relevant here. On January 22, 2010, the Board issued an order docketing Sprint's complaint and setting a procedural schedule that contemplated prefiled direct testimony and evidentiary hearing at which Sprint could have offered any and all relevant evidence, pursuant to Iowa Code § 17A.14. On January 27, 2010, Sprint filed a motion to, among other things, withdraw its complaint, cancel the hearing, and proceed to briefing of issues Sprint described as "purely legal." (January 27, 2010, Motion, p. 4.) Sprint described these issues as "the propriety of call blocking or threats to block calls," along with "what the tariff says about withholding" and "the jurisdiction and treatment of VoIP traffic." (Id., pp. 3-4.) Those are the issues that the Board decided; Sprint cannot claim that these "purely legal" issues now require an evidentiary hearing apparently because the Board decided the issues in Windstream's favor.

In its Application, Sprint appears to argue that the AP Debit Balance issue is not within the scope of the "purely legal" issues." (Application, p. 4.) However, Sprint's use of the AP Debit Balance tool was part of the reason that Iowa Telecom notified Sprint of potential call blocking, because Iowa Telecom believed that Sprint was improperly withholding undisputed amounts in contravention of the tariff provisions. Even Sprint says that "[t]here is no language on the face of Iowa Telecom's tariffs

addressing whether, when there is a legitimate disputed amount that has been paid, future undisputed amounts can be 'paid' against an outstanding balance ... ." (Id.) With this statement, Sprint admits it was withholding undisputed amounts and that the issue is tied to what the tariff says. Thus, the AP Debit Balance is tied to two of the issues Sprint itself identified as "purely legal."

Further, as noted above, Sprint's Initial Brief expressly asked the Board to find that Sprint's "use of an AP Debit Balance did not provide justification for Iowa Telecom to threaten unilateral blocking of live traffic." (Sprint Initial Brief, unnumbered p. 7.) Deciding that issue requires an evaluation of whether the AP Debit Balance is permitted under the tariff or otherwise a reasonable practice. If Sprint thought evidence was necessary to make that determination, it should have used the opportunity to present evidence contemplated in the Board's original schedule, or it should have asked the Board to re-schedule the hearing after it was canceled. Instead, Sprint asked that the hearing be canceled, asked the Board to decide the AP Debit Balance issue, and only when the decision was adverse to Sprint's interest did Sprint assert that evidence somehow is necessary. The Board finds that Sprint has failed to show good reason for why it did not present the evidence earlier in the proceeding. The Board will not give Sprint two tries on this issue.

IT IS THEREFORE ORDERED:

The "Application for Reconsideration" and "Motion for Stay" filed by Sprint Communications Company L.P. in this docket on February 23, 2011, are denied as discussed in this order.

UTILITIES BOARD

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper

/s/ Darrell Hanson

Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 25th day of March 2011.

APPENDIX D

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

Sprint Communications Company, L.P.,
Complainant

Docket No. FCU-2010-0001

v.

Iowa Telecommunications Services, Inc., d/b/a/ Iowa Telecom,
Respondent.

ORDER

(Issued February 4, 2011)

INTRODUCTION

In resolving this dispute, the Utilities Board (Board) will decide whether certain interexchange Voice over Internet Protocol (VoIP) traffic delivered by Sprint Communications Company L.P. (Sprint) to Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom,[1] is jurisdictionally interstate or intrastate.

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[1] Pursuant to a reorganization proceeding identified as Docket No. SPU-2009-0010, Iowa Telecom merged with Windstream Corporation and was renamed Windstream Iowa Communications, Inc. Because this complaint proceeding was

If the traffic is jurisdictionally interstate, then it is under the jurisdiction of the Federal Communications Commission (FCC). If the traffic is jurisdictionally intrastate, then it is subject to the Board's jurisdiction and subject to the access charges in Iowa Telecom's intrastate switched access tariff.

The parties explain the origin of this dispute in various ways. Iowa Telecom notes that since the mid-1990s carriers have provided voice services formatted in the Internet Protocol (IP) for some part of transmission of traffic and have used the networks of local exchange carriers (LECs) to originate or terminate calls to and from end users with telephone service from providers that use the time division multiplexing (TDM) format, sometimes known as "plain old telephone service." (Iowa Telecom Initial Brief, p. 15.)

Sprint admits it previously paid Iowa Telecom access charges for the VoIP traffic in question, but explains it revisited this practice given that the status of VoIP traffic has been unclear for years. (Sprint Initial Brief, unnumbered page 2.) Sprint asserts that other carriers have stopped paying access charges or have never paid them, putting Sprint in a position of paying out charges on VoIP traffic it carries to and from LECs, but not receiving payment on traffic it terminates. (Sprint Reply Brief, pp. 27-28.)

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initiated before Iowa Telecom was renamed, the Board will refer to the company as Iowa Telecom throughout this order.

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) puts the dispute in context, explaining that the FCC has recently begun to consider the transition from a circuit-switched network to an all IP-network, observing that broadband "is a growing platform over which the consumer accesses a multitude of services, including voice, data, and video in an integrated way across applications and providers" (Consumer Advocate Brief, p. 7, citing *A National Broadband Plan for Our Future*, GN Docket No. 09-47, 09-51, 09-137, NBP Public Notice #25 *Comments Sought on Transition from Circuit-Switched Network to All-IP Network*, DA 09-2517 at 1-2 (December 1, 2009)).

Consumer Advocate observes that the FCC's 2004 decision to preempt Minnesota's regulation of a particular form of VoIP service provided by Vonage, Inc., has failed to produce regulatory certainty. (Consumer Advocate Brief, pp. 6-7.) According to Consumer Advocate, regulatory uncertainty "has been driven by continuing technological evolution in IP-based services and the lack of further definitive action by the FCC." (Consumer Advocate Brief, p. 7.) In its brief, Consumer Advocate includes the following comments from the Pennsylvania Public Utilities Commission in the FCC's inquiry on the transition to an all-IP network, which highlight the problems that result in the absence of regulatory certainty:

> Telecommunications facilities and services are jointly regulated by the states and the FCC whereas the FCC loosely regulates Information Services. The FCC inconsistently classifies some

> network facilities and services as "information service[s]" but other networks or services are classified as "telecommunications" with shared jurisdiction. It is intuitively understood, and the FCC has already acknowledged, that broadband network facilities are *jointly* used for the provision of telecommunications and information services. For example, fiber optic broadband facilities are jointly used for the *transmission* of legacy PSTN [public switched telephone network] voice traffic, the transmission of IP-based VoIP calls, the interconnection function between telecommunications common carriers and information service providers, etc. To arbitrarily label broadband network facilities as "information services" defeats on paper this network engineering reality and creates unwarranted regulatory implications both at the federal and state regulatory jurisdictions in major areas such as nondiscriminatory interconnection and intercarrier compensation.

(Consumer Advocate Brief, p. 8, citing Comments of Pennsylvania Pub. Util. Comm'n, GN Dockets No. 09-47, 09-51, 09-137, NBP Public Notice #25 at 2-3, filed December 21, 2009.)

This case also involves an issue regarding whether Sprint properly disputed Iowa Telecom's access charges as permitted under Iowa Telecom's switched access tariff. Finally, there is an issue whether Iowa Telecom may disconnect Sprint, a wholesale carrier, for non-payment in these circumstances without the Board's approval.

PROCEDURAL HISTORY

On January 6, 2010, Sprint filed with the Board a complaint against Iowa Telecom alleging that Iowa Telecom was assessing incorrect charges for routing and handling certain telecommunications traffic. Sprint described the traffic at issue as VoIP[2] calls. Sprint stated in its January 6, 2010, "Complaint and Request for Emergency Relief" (Sprint Complaint) that it operates its wholesale operations in Iowa under an "Order in Lieu of Certificate," issued by the Board on March 3, 2006. According to Sprint, that order authorizes Sprint to provide its telecommunications services to wholesale customers and guarantees to Sprint sufficient rights, privileges, and obligations of a competitive local exchange carrier (CLEC) to allow Sprint to provide wholesale services, including the right to interconnection and to obtain numbering resources. (Sprint Complaint, ¶ 5.) Sprint also states that it operates under Board and FCC authority as an interexchange carrier in Iowa. (Sprint Complaint ¶ 5.)

Sprint filed its complaint pursuant to Iowa Code §§ 476.3, 476.100, and 476.101. Sprint alleged it properly disputed the Iowa Telecom charges and

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[2] In *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007), the Eighth Circuit Court of Appeals explained that "VoIP is an internet application utilizing "packet-switching" to transmit a voice communication over a broadband internet connection. In that respect, it is different from the "circuit-switching" application used to route traditional landline telephone calls. In circuit-switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call."

withheld the disputed amounts, as permitted by Iowa Telecom's access tariffs. Sprint also alleged that Iowa Telecom was going to cease providing facilities for Sprint traffic beginning on January 8, 2010, effectively blocking calls. Sprint asked the Board for emergency relief.

On January 7, 2010, Iowa Telecom filed a preliminary partial answer stating it would not discontinue access services to Sprint as long as Sprint remained current on newly-billed access charges. On January 19, 2010, Iowa Telecom filed an answer and motion for injunctive relief, stating it had assessed the appropriate intrastate access charges under its tariff. Iowa Telecom denied that its access services tariff allows continued withholding of payment after a dispute has been denied. Citing Iowa Code § 476.5 and Board rules 22.14 and 22.15, Iowa Telecom asserted it is required to disconnect Sprint's intrastate switched access service due to Sprint's nonpayment of carrier common line charges (CCLCs). Iowa Telecom asked the Board to issue an order requiring Sprint to immediately pay to Iowa Telecom all withheld intrastate switched access charges invoiced to date and in the future where Iowa Telecom has denied Sprint's billing dispute, and prohibiting Sprint from offsetting funds payable to Iowa Telecom for access services from other funds payable to Iowa Telecom for other services provided to Sprint or Sprint affiliates. Finally, Iowa Telecom asked that if the Board decides that a Board proceeding is necessary before Iowa Telecom disconnects intrastate switched access service to Sprint under facts similar to those involved in this proceeding, that the Board state that Iowa Telecom

may terminate such service to Sprint after following the procedures in Section 2.1.8 of the Iowa Telecom tariff if Sprint fails to make any payment which may be required by a Board order.

On January 22, 2010, the Board issued an order docketing Sprint's complaint as Docket No. FCU-2010-0001 and setting an expedited procedural schedule.

On January 27, 2010, Sprint filed a motion to withdraw, motion for clarification, and a contingent motion to revise the procedural schedule. With respect to its request to withdraw the complaint, Sprint argued that the only relief it sought was for the Board to prohibit Iowa Telecom from discontinuing service and that the specific claims in its complaint were no longer ripe. In characterizing the posture of the case as "fatally flawed," Sprint asserted that Iowa Telecom had not properly filed any claims to date; Iowa Telecom's filings raised broader issues than those stated in Sprint's complaint; and that Iowa Telecom's claims would not be eligible for expedited resolution under Iowa Code § 476.101(8).

Acknowledging that the parties' potential call blocking dispute is likely to recur, Sprint asked the Board to require Iowa Telecom to clarify whether it is raising counterclaims and, if so, to state those claims more clearly. Sprint suggested the Board could sever the claims eligible for expedited review from non-expedited claims. Sprint asserted that the only issue in dispute in this proceeding is the propriety of call blocking or threats to block calls and argued that this is a legal issue that can be resolved

without a hearing. Sprint urged the Board to move directly to briefing rather than requiring testimony and hearing.

On January 28, 2010, Iowa Telecom filed a response resisting Sprint's motions, arguing that the Board must consider the underlying merits of the parties' billing dispute in the context of the expedited proceeding already underway. Iowa Telecom rejected Sprint's assertion that the issues involved in this controversy were not ripe and stated the matter was likely to recur quickly if Sprint were allowed to withdraw its complaint. Iowa Telecom argued it would be unfair to allow complainants to invoke emergency injunctive relief but avoid consideration of the merits of the dispute when temporary relief is granted to the adverse party. Iowa Telecom pointed to Iowa Code § 17A.18A for support, arguing that the General Assembly intended that an agency's order for emergency relief be followed by a full determination of the merits of the dispute. Iowa Telecom asserted it has a right to be heard on all of the merits of Sprint's complaint and that this controversy should be resolved promptly. Iowa Telecom urged the Board to continue the expedited schedule already in place.

On February 1, 2010, the Board issued an order granting Sprint's motion to withdraw its complaint, denying Sprint's motion for clarification, and revising the procedural schedule. The Board explained that both parties acknowledge there is an underlying dispute about their rights and obligations with respect to the application of tariffed charges to certain telecommunications traffic. The Board

allowed Sprint to withdraw its complaint but decided to continue this proceeding in order to give full consideration to the underlying dispute that resulted in the threatened disconnection. The Board explained that the docket would remain open, but not under the expedited procedural schedule established in the Board's docketing order. Instead, the Board explained it would recast the proceeding to consider Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue. The Board did not agree with Sprint's assertion that Iowa Telecom had not identified the issues for the Board's consideration with sufficient clarity. The Board did not require Iowa Telecom to file any additional claims or clarification. The Board observed that the issues as expressed in the parties' filings to date relate generally to the parties' rights and obligations (as provided in federal law, state law, and Iowa Telecom's tariff) regarding intrastate switched access charges, including CCLCs, and particularly as applied to VoIP traffic, including non-nomadic VoIP traffic. Related issues include a party's right to withhold payment for disputed charges and a party's right to disconnect service for non-payment. The Board noted that the issues between the parties relate to what rules apply to the traffic in question, not the amount of traffic subject to charges.

The Board agreed with Sprint that the issues raised in Iowa Telecom's pleadings to date were more appropriate for consideration outside of an expedited proceeding conducted under Iowa Code § 476.101(8). The Board observed that the issues in this case are legal issues and that there are no material factual

disputes which would require a hearing. The Board canceled the rounds of testimony included in the procedural schedule and, instead, required simultaneous briefs and reply briefs from the parties.

On March 1, 2010, the Consumer Advocate, Sprint, and Iowa Telecom filed initial briefs. On March 30, 2010, Sprint and Iowa Telecom filed reply briefs.

STATUTORY FRAMEWORK

Iowa Code § 476.1 provides that the Board "shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided." Section 476.1 defines "public utility" to include any person or entity owning or operating facilities for "[f]urnishing communications services to the public for compensation." The definition of the term "telephone utility" in the Board's rules mirrors the definition of "public utility" in § 476.1. "Telephone utility" is defined in the Board's rules at 199 IAC 22.1(3) as "any person, partnership, business association, or corporation ... owning or operating any facilities for furnishing communications service to the public for compensation."

The term "interexchange utility" is defined in the Board's rules at 199 IAC 22.1(3) to mean "a utility, a resale carrier or other entity that provides intrastate telecommunications services and facilities between exchanges within Iowa, without regard to how such traffic is carried." Sprint is an interexchange utility. (*See* Sprint Complaint, ¶ 5.)

The term "local exchange utility" is defined in the Board's rules at 199 IAC 22.1(3) to mean a "telephone utility that provides local exchange service under tariff filed with the board." Iowa Telecom is a local exchange utility. (Iowa Telecom Initial Brief, p. 20.)

Generally, the Board has jurisdiction over intrastate access charges pursuant to Iowa Code §§ 476.3 and 476.11. Iowa Code § 476.3(1) provides that a "public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs" filed with the Board. Section 476.3(1) generally gives the Board the authority to review a utility's rates, charges, schedules, service, or regulations and determine whether they are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law.

Iowa Code § 476.11 gives the Board complaint jurisdiction over arrangements for interconnection of telecommunications services between two providers, specifically whether the terms and conditions of those arrangements are considered to be just, reasonable, and non-discriminatory. The Board has determined that its authority to consider complaints under Iowa Code § 476.11 "necessarily includes the switched access services toll providers must purchase to originate and terminate most interexchange calls."[3] As noted by Consumer Advocate, the Board's jurisdiction under Iowa Code § 476.11 is limited to

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[3] See *In re: Iowa Telecommunications Association*, Docket Nos. TF-07-125 and TF-07-139 "Order Setting Procedural Schedule and Setting Date for Hearing," p. 10, issued November 15, 2007.

intrastate access services. (Consumer Advocate Brief, p. 4, n. 2, citing *Qwest Communications Corp. v. Superior Tel. Cooperative et al.*, Docket No. FCU-07-2, "Final Order," pp. 12-15, issued September 21, 2009.)

The term "intrastate access services" is defined in the Board's rules at 199 IAC 22.1(3) as "services of telephone utilities which provide the capability to deliver intrastate telecommunications services which originate from end-users to interexchange utilities and the capability to deliver intrastate telecommunications services from interexchange utilities to end-users."

The Board's rule at 199 IAC 22.14 applies to intrastate access charges and governs the application of intrastate access charges and the filing of intrastate access service tariffs. 199 IAC 22.14(1)"a" provides that intrastate access charges apply to all intrastate access services rendered to interexchange utilities. Thus, the rule contemplates that interexchange utilities such as Sprint must pay access charges to local exchange utilities such as Iowa Telecom for the origination and termination of intrastate toll traffic.

Iowa Code § 476.20 applies to disconnection of service and provides that a "utility shall not, except in cases of emergency, discontinue, reduce, or impair service to a community, or part of a community, except for nonpayment of account or violation of rules and regulations, unless and until permission to do so is obtained from the board." The Board's rule at 199 IAC 22.16 provides that no "local exchange utility or interexchange utility may discontinue

providing intrastate service to any local exchange or part of a local exchange except in the case of emergency, nonpayment of account, or violation of rules and regulations" except as provided in rule 22.16.

ISSUES

A. Is the VoIP traffic at issue in this dispute subject to intrastate access charges?

Introduction

As explained above, the Board has jurisdiction pursuant to Iowa Code §§ 476.3 and 476.11 to consider disputes involving the application of intrastate access tariffs. In this case, the question before the Board is whether Iowa Telecom's tariffed intrastate access charges apply to Sprint's VoIP traffic. Asked another way, the question is whether Sprint's VoIP traffic is jurisdictionally intrastate (i.e., telecommunications services subject to the Board's authority and state statutes and rules regarding intrastate access charges) or jurisdictionally interstate (subject to the FCC's authority). Resolution of these questions depends on whether the Board's authority in this context has been preempted by the FCC. While the parties express the jurisdictional issue in different ways, all three discuss jurisdiction in connection with the question of whether the FCC has preempted the Board from taking action in this context by determining the traffic is interstate in nature.

Sprint asks whether the underlying issue of compensation for VoIP traffic can be resolved by the

Board or whether the issue is a matter of federal jurisdiction. (Sprint Initial Brief, unnumbered p. 2.) Sprint acknowledges that the status of compensation for VoIP traffic is not clear, but contends the issue must be resolved by the FCC, not the Board. Sprint argues that the Board is preempted from deciding this case because it relates to the compensation for VoIP traffic. Sprint contends its VoIP traffic is jurisdictionally interstate, thus falling under the authority of the FCC. According to Sprint, the Board has no jurisdiction over the traffic and no jurisdiction to resolve the dispute. As will be discussed below, Sprint argues there are two ways of concluding that the Board does not have jurisdiction, the first being preemption through the information services exception, the second being preemption through the impossibility exception. (Sprint Initial Brief, unnumbered pp. 1, 9.)

Consumer Advocate frames the issue as follows:

> The issue which underlies the conflict between Sprint and Iowa Telecom is a familiar one, in contention before courts and regulatory commissions around the country. To resolve it, the Board must decide whether long distance calls transmitted using technology that is in some part VoIP or Internet Protocol-enabled (IP-enabled) are telecommunications services subject to state-regulated intrastate access charges, or whether state regulation of VoIP or IP-enabled services has been preempted by the Federal Communications Commission (FCC), "regardless of its regulatory classification because it was impossible or impractical to separate the

> intrastate components of VoIP service from its interstate components." *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 577 (8th Cir. 2007).

(Consumer Advocate Brief, p. 6.)

Iowa Telecom reaches the question of whether the Board's jurisdiction has been preempted and argues it has not, but first analyzes the application of its access tariff to the VoIP traffic in dispute. Iowa Telecom argues that the traffic is subject to access charges because Sprint carries the traffic as a common carrier between two exchanges in Iowa. Iowa Telecom asserts that the Board has already decided that non-nomadic VoIP traffic is not different from traditional telecommunications traffic and is subject to rules governing intercarrier compensation. (Iowa Telecom Initial Brief, p. 12, citing *In re: Level 3 Communications, LLC v. Qwest Corp.*, Docket No. ARB-05-4, "Arbitration Order," issued December 16, 2005; "Order on Reconsideration," issued July 19, 2006 (*Qwest-Level 3 Arbitration Order*). Iowa Telecom emphasizes that the "application of state intrastate access charges to interexchange voice calls is squarely within the jurisdiction of the Iowa Board." (Iowa Telecom Reply Brief, p. 6.)

Summary of the parties' positions

Iowa Telecom

Iowa Telecom states that in the mid-1990s some carriers began to provide voice services formatted in the IP for at least some part of the transmission of the voice traffic. These carriers continued to use LEC networks to originate or terminate telephone calls to

and from end users with telephone service from providers whose networks employed the more traditional TDM format.

Iowa Telecom explains that from an end user's perspective, there are two types of VoIP calls, nomadic and non-nomadic. Nomadic VoIP service allows a VoIP customer to use a broadband Internet connection anywhere in the world to place a call. Non-nomadic VoIP traffic closely resembles traditional TDM voice traffic because end-user customers typically hold voice conversations in real time using equipment located at their premises. The only difference between VoIP and TDM traffic is that one or both ends of the VoIP call is sent in packets over a broadband network. In order to use the broadband network, the VoIP end user's equipment transmits the call in IP format instead of TDM format. The broadband carrier converts the IP-formatted message to TDM in order to hand off the call to the LEC. (Iowa Telecom Initial Brief, pp. 16-17.)

Iowa Telecom states that Sprint and its Iowa cable partner are in the business of providing non-nomadic VoIP-based telecommunications service – a fixed service from which the location of the originating customer can be determined from examining the originating telephone number. In arguing that the traffic at issue in this case is telecommunications traffic subject to Iowa Telecom's intrastate access tariff, Iowa Telecom recalls that when Sprint's cable partner, MCC Telephony of Iowa, Inc. (MCC), applied for its Iowa certificate, it told the Board that it would provide the full range of

telecommunications services. (Iowa Telecom Initial Brief, pp. 17-18.)

Both the Board and the Eighth Circuit Court of Appeals have ruled that Sprint, in the role as MCC's carrier partner, may be considered a telecommunications carrier (common carrier) when performing this partnering function with MCC. (Iowa Telecom Initial Brief, p. 18, citing the Board's decision in *Sprint Communications Co. L.P. v. Ace Communications Group, et al.*, Docket No. ARB-05-2, "Order on Rehearing" (November 28, 2005), and the Court's decision in *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743, 749 (8th Cir. 2009)). Thus, Sprint had the right to demand an interconnection agreement with Iowa Telecom pursuant to sections 251 and 252 of the Telecommunications of 1996 (the Act). That interconnection requirement was based on the underlying assumption that the traffic that Sprint would be exchanging with Iowa Telecom, when Sprint was jointly providing service with MCC, was telecommunications traffic. Otherwise, there would be no traffic to which the compensation provisions of an interconnection agreement would apply. Iowa Telecom argues that Sprint cannot have it both ways – either it is a telecommunications carrier when transporting MCC's traffic and must pay access charges or it is not, which would mean that it is no longer entitled to interconnection with Iowa Telecom.

Iowa Telecom argues in its Reply Brief that even if Sprint's retail-carrier customer were transmitting an information service, access charges would still apply. Iowa Telecom's position is that Sprint

operates as a common carrier when it delivers voice traffic to Iowa Telecom's network and because the traffic is intrastate and between exchanges, the terms of Iowa Telecom's tariff require Sprint to pay access charges. (Iowa Telecom Reply Brief, p. 6.)

Iowa Telecom notes that its access tariff applies to intrastate, interexchange traffic that Sprint originates or terminates on Iowa Telecom's local exchange network. Iowa Telecom explains that the reciprocal compensation provisions of its interconnection agreement with Sprint do not include information services traffic. Under the tariff, the customer is billed for access services to which it has subscribed and must pay the bill. (Iowa Telecom Initial Brief, p. 20.)

Iowa Telecom argues that by the terms of the tariff Sprint is liable for Iowa Telecom's access charges on VoIP traffic regardless of how VoIP traffic is characterized from a technical perspective. Under the filed rate doctrine, a tariff filed with a regulatory agency forms the exclusive source of the terms and conditions by which the common carrier provides service to its customers. The filed rate doctrine extends to all the terms in the tariff, not just the terms that specifically set rates. Courts and state utility commissions must follow and enforce the terms in a tariff because they form the law and are not mere contracts. (Iowa Telecom Initial Brief, p. 21.)

Sprint asserts that access charges do not apply because VoIP is an information service, Sprint is an information services provider, and the FCC has decided that VoIP traffic is exclusively interstate

traffic. Iowa Telecom argues to the contrary that the FCC allows the application of intrastate access charges when the VoIP traffic at issue originates and terminates in different local calling areas (LCAs) in the same state. On this point, Iowa Telecom explains that the traffic at issue in this case is voice traffic initiated by an end user, transmitted by Sprint as a common carrier, terminated to Iowa Telecom's network as a TDM message, and delivered to an end user on Iowa Telecom's network. Iowa Telecom states that the FCC has refused to find that access charges do not apply to VoIP traffic and predicts that FCC policy will require that VoIP traffic be classified as a telecommunications service for purposes of intercarrier compensation and as such will be subject to access charges. (Iowa Telecom Initial Brief, pp. 22-23.)

Iowa Telecom reviews the history of the FCC's decisions since 2004, noting in particular the following statement in the *IP-Enabled Services Notice of Proposed Rulemaking* (NPRM)[4] where, according to Iowa Telecom, the FCC indicated its opposition to "network free riders and reinforced its stance that all PSTN should pay fair compensation":

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable

[4] *IP-Enabled Services*, WC Docket No. 04-36, "Notice of Proposed Rulemaking," 19 FCC Rcd. 4863 (rel. March 10, 2004). (IP-Enabled Services NPRM.)

> network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.

(Iowa Telecom Initial Brief, p. 23, citing *IP-Enabled Services NPRM* at ¶ 61.) Iowa Telecom emphasizes the FCC has imposed common carrier obligations on VoIP services. Iowa Telecom observes that the trend of the FCC's decisions is to treat VoIP calls as any other voice calls placed over TDM networks. (Iowa Telecom Initial Brief, pp. 23-24.)

Iowa Telecom also argues that the Board's rules require payment of a CCLC. Iowa Telecom argues that all elements of the Board's rule at 199 IAC 22.14(1)"b" are met with respect to the traffic at issue in this case, as the transmissions in question are communications of the type transmitted by telephone utilities; the transmission is between Iowa exchanges; the facilities carrying the transmission are connected to the PSTN pursuant to access services requests and the interconnection agreement between Sprint and Iowa Telecom; and the transmission passes over exchange utility facilities. Iowa Telecom observes that the transmissions at issue in this case are originated by MCC pursuant to its Board certificate, acting as a telephone utility as defined in the Board's rules, and Sprint is treated as a telecommunications carrier under federal law. Iowa Telecom asserts that an entity acting as a telephone utility is providing telecommunications service. Thus, Iowa Telecom argues its assessment of the CCLC is warranted. (Iowa Telecom Initial Brief, pp. 27-28.)

Iowa Telecom argues that the Board already decided in the *Qwest-Level 3 Arbitration Order* that access charges apply to non-nomadic VoIP traffic. As support for the assertion that the Board has decided that non-nomadic VoIP traffic is subject to access charges just as any other interconnected wireline traffic terminating in a LCA other than where it originates, Iowa Telecom relies on the following discussion in that order:

> Traditionally, a voice call between separate LCAs is a toll call and must be treated as such. The Board finds that this rule applies equally to all calls regardless of the technology used, including VoIP. Thus, when a call is originated in IP format on IP-compatible equipment and is handed off to Qwest within a LCA where the ESP is located, but the call is being sent for termination to another LCA, the provider is not entitled to free transport to the terminating LCA under the ESP exemption or on any other basis, nor is it allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a physical presence in that LCA.

(Iowa Telecom Initial Brief, p. 29, citing *Qwest-Level 3 Arbitration Order* at 31.)

Iowa Telecom contends that Sprint is wrong in asserting that its VoIP traffic is an information service not subject to access charges. Iowa Telecom notes that the FCC announced its intention to review the overall regulatory scheme to be applied to VoIP traffic in the *IP-Enabled Services NPRM*. In that proceeding, the FCC specifically signaled its opposition to network free riders and reinforced its

stance that all PSTN users should pay fair compensation. Similarly, in *In the Matter of Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, adopted January 21, 2009 (*Feature Group IP Order*), the FCC refused to rule that access charges do not apply to VoIP traffic terminating on ILEC networks.

Iowa Telecom contends that the enhanced services exception (now known as the information services exception) has never applied to VoIP calls transmitted by a common carrier. Instead, the exception applies only to the actual provider of the service, not to an intermediary transmitting a long distance call. Iowa Telecom argues that Sprint is not performing any net protocol conversion itself and thus cannot take advantage of the exception. (Iowa Telecom Initial Brief, p. 31.)

Iowa Telecom states that Sprint cites only one case – *PAETEC Communications, Inc. v. CommPartners, LLC*, Civ. No. 98-0397, Mem. Order (D.D.C. February 18, 2010) (the *PAETEC Decision*) – where the information services exemption has been applied to VoIP traffic. In that case, the federal district court determined that access charges do not apply to information services. Iowa Telecom asserts there are several factual errors in the *PAETEC Decision* which contradict FCC orders that have applied access charges. Iowa Telecom characterizes the PAETEC Decision as inconsistent with past precedent. (Iowa Telecom Reply Brief, pp. 7-9.)

Iowa Telecom faults the *PAETEC Decision* for its reliance on the decision in *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission*, 461 F.Supp.2d 1055 (E.D. Mo. 2006), *aff'd on other grounds*, 530 F.3d 676 (8th Cir. 2008), *cert. den.*, 125 S.Ct. 971 (2009) (*Southwestern Bell*), a case cited by Sprint in discussing the importance of net protocol conversion. (See Sprint Reply Brief, p. 12.) Iowa Telecom contends the Court in *Southwestern Bell* was considering an appeal from a state regulatory commission about whether an interconnection agreement applied to the facts before the commission. According to Iowa Telecom, the *PAETEC Decision* does not address whether the traffic at issue in *Southwestern Bell* was similar to the traffic at issue in the PAETEC case and does not address the application of state tariff provisions. Further, Iowa Telecom points out that in response to an argument from a cable company that access charges did not apply to its voice traffic, the Court in *Southwestern Bell* ruled that access charges applied to the voice traffic. (Iowa Telecom Reply Brief, p. 8, citing *Southwestern Bell* at 1088.)

According to Iowa Telecom, the FCC has not preempted state regulation of non-nomadic VoIP traffic, the type of calling involved in this dispute. Both the FCC and courts have distinguished between nomadic and non-nomadic VoIP. To date, the primary instance in which the FCC has asserted exclusive jurisdiction over VoIP involved a request by Vonage to preempt an order of the Minnesota PUC that attempted to regulate Vonage as a telecommunications carrier. The FCC's rationale for

preempting Vonage's service was based on the nomadic nature of Vonage's service, i.e., because a VoIP caller could place or receive calls in various locations, Vonage's service was appropriately characterized as interstate. The Eighth Circuit Court of Appeals recognized the distinction between nomadic and non-nomadic VoIP service in *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007). (Iowa Telecom Initial Brief, pp. 25-26.)

Iowa Telecom also notes that the FCC later explained in the VoIP USF Contribution Order that the rationale of its Vonage Order applied only to nomadic VoIP, referring to the FCC's statement that "an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation." (Iowa Telecom Initial Brief, p. 26, citing *Universal Service Contribution Methodology*, WC Docket No. 06-122, 21 FCC Rcd 7518, ¶ 56, rel. June 27, 2006.)

As further support for its position that the FCC has not preempted state jurisdiction over intrastate VoIP calls, Iowa Telecom cites the FCC's 2009 decision in *Petition of UTEX Commun's Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, 24 FCC Rcd 12573 (Wir. Comp. Bur. 2009) (UTEX Decision). In that proceeding, the FCC ruled that a state public utility commission

should resolve a case involving VoIP traffic and access charge issues. Iowa Telecom asserts there is no reason why the Board should avoid deciding this case. (Iowa Telecom Initial Brief, pp. 26-27.)

Iowa Telecom argues that many other state public utility regulatory agencies have reached the same conclusion that intrastate access charges apply to nonnomadic VoIP traffic. Iowa Telecom highlights the Pennsylvania Public Utility Commission's February 11, 2010, decision in *Palmerton Tel. Co. v. Global NAPS South, Inc.*, Docket No. C-2009-2093336 (Pa. Pub. Util. Comm.). In that case, the Pennsylvania PUC likened a trucking firm's application of the same charges for transport of different types of cargo on the same truck to a common carrier's use of the LEC network, which is the same for VoIP and TDM voice calls. Iowa Telecom urges the Board to follow this precedent. (Iowa Telecom Initial Brief, pp. 30-31.)

Consumer Advocate

Consumer Advocate states that the Board has described its authority over intrastate access charges as "'complaint based,' arising from its duty under Iowa Code § 476.11 ... to determine the terms and procedures under which toll (or interexchange) communications are interchanged" and that the Board's jurisdiction is invoked only where carriers cannot agree to terms and procedures. (Consumer Advocate Brief, p. 4, citing *In re: High Volume Access Service*, Docket No. RMU-2009-0009, "Order Initiating Rule Making," p. 3, issued September 18, 2009.)

Consumer Advocate contends the FCC's preemption of state regulation of Vonage's VoIP service applies only to that particular service and services with the same capabilities. (Consumer Advocate Brief, p. 6.) According to Consumer Advocate, the FCC's Vonage Order has not produced regulatory certainty and the FCC has not yet resolved the classification of IP-enabled services. (Consumer Advocate Brief, p. 7.)

Consumer Advocate states that when the Eighth Circuit affirmed the FCC's Vonage Order, it declined to resolve the question of whether preemption applied only to nomadic VoIP service. Consumer Advocate explains, however, that the court noted that in the FCC's subsequent USF Contribution Methodology order, the FCC limited the application of federal preemption, citing the following passage:

> [S]ubsequent to issuing the [Vonage] order we are reviewing, the FCC recognized the potentially limited temporal scope of its preemption of state regulation in this area in the event technology is developed to identify the geographic location of nomadic VoIP communications. In proceedings to address VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated 'an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be

> applicable to such an interconnected VoIP provider.'

(Consumer Advocate Brief, pp. 9-10, citing *Minn. Pub. Utils. Comm'n*, 483 F.3d at 579-80, citing *Universal Service Contribution Methodology*, 21 F.C.C.R. 7518 at ¶ 56 (2006), 2006 WL 1765838).

Like Iowa Telecom, Consumer Advocate cites post-Vonage FCC decisions to support its assertion that the jurisdiction of state regulatory agencies over certain VoIP and IP-enabled services has not been preempted. (Consumer Advocate Brief, p. 10, citing *Feature Group IP Order*.) Consumer Advocate also points to the FCC's UTEX Decision to support its position that the Board's jurisdiction in this dispute has not been preempted and that the Board can and should resolve this dispute. Consumer Advocate explains that in UTEX, the FCC decided that a state public utility commission does not need to wait for the FCC to determine the regulatory classification of IP-enabled services before arbitrating a case involving VoIP compensation issues.

Consumer Advocate states that the record indicates that Sprint began withholding payment to Iowa Telecom not because there was a new or definitive ruling from the FCC or courts, but only because Sprint "revisited" its own position on VoIP. Thus, until the summer of 2009, Sprint was paying tariffed intrastate switched access charges to terminate long distance calls to Iowa Telecom's network. (Consumer Advocate Brief, p. 11.)

Consumer Advocate also states that the record indicates that the traffic in dispute consists of calls

originated through Sprint's arrangements with cable television providers. End users place calls, formatted as Internet Protocol, on ordinary customer premise equipment (CPE). The calls are switched by Sprint, routed over the PSTN, and delivered for termination to Iowa Telecom using Feature Group D (FGD) facilities. Based on these facts, Consumer Advocate concludes the VoIP service at issue is "fixed VoIP" rather than "nomadic VoIP" which has been the subject of FCC preemption.

From a technological and functional perspective, there is no practical distinction between POTS and the type of VoIP service provided by Sprint as a wholesale carrier for cable telephony companies. Cable telephony end users can purchase telephone service without also purchasing Internet or broadband service, and are not required to use the Internet to place a call. The location of the end-user customer's service is fixed, so that both end points of a call can be easily determined. (Consumer Advocate Brief, p. 12.)

Consumer Advocate argues that to allow a carrier like Sprint to avoid paying intrastate switched access charges would give Sprint competitive advantage over other IXCs. Consumer Advocate points out that the FCC has expressed concern about prohibiting the use of access charges as intercarrier compensation where no other means of compensation is in place. (Consumer Advocate Brief, p. 13, citing *Re: Feature Group IP Petition*, ¶¶ 3, 8-10.) Consumer Advocate states that Iowa Telecom's intrastate access tariff has been approved by the Board and the rates are correctly applied to the intrastate interexchange

calls carried by Sprint and delivered to Iowa Telecom as long as the calls are not the type of nomadic VoIP service explicitly preempted by the FCC. (Consumer Advocate Brief, p. 13.)

Sprint

Sprint states the underlying dispute is whether it is proper for Iowa Telecom to charge traditional access charges on traffic originated as VoIP. Sprint maintains that because the traffic is jurisdictionally interstate, the precise nature of compensation for the traffic is outside the Board's jurisdiction and the traffic is not subject to Iowa Telecom's intrastate access tariff. Sprint argues there are two independent ways to reach this conclusion. First is preemption under the "information services" exception. Second is preemption under the "impossibility" exception. (Sprint Initial Brief, unnumbered p. 9.)

Sprint discusses the history of the Minnesota PUC's efforts to apply its traditional telephone company regulations (i.e., requirements to obtain a certificate to provide telephone service; submit a 911 service plan and pay 911 fees; and file a tariff) to the "Digital Voice" VoIP service offered by Vonage Holdings Corporation (Vonage). Vonage sought review of the Minnesota PUC's actions before the FCC and in federal district court. In *Vonage Holdings Corp. v. Minnesota PUC*, 290 F.Supp.2d 993 (D. Minn. 2003), the federal district court found that Vonage provided an "information service" as opposed to a "telecommunications service." The Court noted that the FCC's guidelines for identifying a telecommunications service require that to be

classified as a telecommunications service, the transmission of customer information does not change that information in form or content. The Court found this was not true for Vonage's IP-to PSTN calling. Thus, the Minnesota PUC could not regulate an information service provider such as Vonage as if it were a telecommunications provider.

The FCC ruled on the matter in its 2004 "Vonage Declaratory Order," *In the Matter of Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, 199 FCC Rcd. 22404, rel. Nov. 12, 2004 (*Vonage Declaratory Order*). Although the FCC did not rule on whether Vonage provided an information service or telecommunications service, it determined that, under the "impossibility exception," the Minnesota PUC was preempted from regulating Vonage. The FCC found it was impossible or impractical to separate Vonage's interstate and intrastate functionality. Anticipating Iowa Telecom's argument that the FCC's *Vonage Declaratory Order* preempting state regulation of VoIP services is limited to nomadic VoIP, Sprint argues to the contrary that the FCC intended the impossibility exception to apply broadly to other VoIP services such as the cable telephony services at issue in this proceeding. Sprint contends that the FCC meant to include cable telephony service, referring to the FCC's statement that "to the extent other entities, such as cable companies, provide VoIP services we would preempt state regulation to an extent comparable to what we have done in this Order." (Sprint Initial Brief,

unnumbered page 12, citing *Vonage Declaratory Order*, ¶ 12.)

Sprint points to other rulings issued since the Vonage orders that it claims reaffirm the application of the information services exception and the impossibility exception for VoIP traffic. Most recent of these is a ruling issued by the U.S. District Court for the District of Columbia District in February 2010 in the *PAETEC Decision*. There, the court found that the critical feature which characterizes VoIP traffic as an information service is net protocol conversion, i.e., where a call originates in IP and is converted to TDM for termination on the PSTN. Sprint states that all the disputed traffic in this case undergoes a net protocol conversion, making it an information service. (Sprint Initial Brief, unnumbered pp. 12-13.)

In support of the assertion that IP-PSTN service is an information service which is exempt from state regulation and access charges, Sprint also cites the *Southwestern Bell* decision, where the Court stated that while "the FCC has not yet ruled whether IP-PSTN is [an information] service, the orders it has issued lead to the conclusion that IP-PSTN is an 'information service.'" (Sprint Reply Brief, p. 12, citing *Southwestern Bell*, 461 F.Supp.2d at 1081.)

In its Reply Brief, Sprint provides additional history on the information service exception beginning with the FCC's 1980 Computer II rules, *In re: Amendment of Sect. 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417-423. At that time, services were classified as either "enhanced" or "basic." Enhanced

services meant there was a protocol conversion and the FCC would not apply the Act's Title II common carrier requirements to these services. Under the 1996 Act, "enhanced services" became "information services" and "basic services" became "telecommunications services." Sprint states that the Act signaled a move in a more deregulatory direction for information services and that access charges were disfavored. (Sprint Reply Brief, pp. 3-6.)

According to Sprint, since passage of the 1996 Act, there have been a number of rulings classifying VoIP services as information services. Sprint cites the FCC's decision in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (*Cable Modem Order*) that classified cable modem broadband Internet service as an information service. The Cable Modem Order was upheld by the U.S. Supreme Court in *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X Decision*). (Sprint Reply Brief, p. 7.)

Sprint states that it is not asking that Iowa Telecom deliver the traffic at issue without compensation. Citing the FCC's decision in *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, To Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-709, 22 FCC Rcd. 3513, Rel. March 1, 2007, (*Time Warner Declaratory Order*), Sprint asks the Board to order a reciprocal

compensation arrangement pursuant to section 251 of the Act as opposed to access charges.

Sprint states the proper reciprocal compensation arrangement would be bill-and-keep.[5] (Sprint Reply Brief, pp. 17-18.) Sprint also asserts that the 1996 Act preferred reciprocal compensation and preserved the access charge regime in a limited way, pursuant

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[5] The FCC explains on its Web site at www.fcc.gov/wcb/ppd/IntercarrierCompensation that "Intercarrier compensation refers to the charges that one carrier pays to another carrier to originate, transport, and/or terminate telecommunications traffic." Intercarrier compensation rates vary based on several factors, including where a call begins and ends and what type of traffic is involved. The two primary forms of intercarrier compensation are access charges (which apply to calls which begin and end in different local calling areas) and reciprocal compensation (which applies to calls which begin and end in the same local calling area). "Bill-and-keep" is a reciprocal compensation arrangement in which carriers recover all of the costs of originating and terminating traffic from their own customers instead of from other carriers. 47 C.F.R. § 51.713(a) provides that "bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network." § 51.713(b) allows a state commission to impose bill-and-keep arrangements if that commission determines that the amount of traffic from one network to the other is roughly balanced with the amount of traffic flowing in the opposite direction. The Board's rule at 199 IAC 38.6(1) contemplates a bill-and-keep arrangement, providing that until the Board "approves monetary compensation and until tariffs for the compensation are in effect, each local utility shall terminate local and extended area service calls on a mutual exchange of traffic basis, at no charge to the originating provider."

to which access charges do not apply to IP-PSTN VoIP traffic. (Sprint Reply Brief, p. 16.)

Discussion

Whether Sprint's traffic is subject to Iowa Telecom's intrastate access tariff depends, in this case, on whether the traffic is "interstate" or "intrastate." Sprint argues the VoIP nature of the traffic makes the calls jurisdictionally interstate and, as such, the traffic is not subject to Iowa Telecom's intrastate switched access tariff. Sprint contends there are two independent paths leading to the conclusion that this traffic is jurisdictionally interstate and preempted from intrastate tariffs. (Sprint Initial Brief, unnumbered p. 9.)

The first path, taken by the FCC in *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd. 3307 (2004) (*Pulver Ruling*), and more recently by the federal district court for the D.C. District in the *PAETEC Decision* is the "information services exception." The second path, taken by the FCC in the *Vonage Declaratory Order*, is the "impossibility exception."

Iowa Telecom and Consumer Advocate argue the traffic is jurisdictionally intrastate, has not been preempted, and remains subject to Iowa Telecom's intrastate access tariff. (Consumer Advocate Initial Brief, p. 13; Iowa Telecom Initial Brief, p. 32; Iowa Telecom Reply Brief, p. 6.) Iowa Telecom and Consumer Advocate distinguish between nomadic

and non-nomadic VoIP services. They acknowledge that the FCC preempted states from regulating nomadic VoIP services, but both assert that states have retained the right to regulate non-nomadic VoIP services. Iowa Telecom and Consumer Advocate note that Sprint paid Iowa Telecom's intrastate access charges on this traffic until the summer of 2009.

Before reaching the question of whether the Board's jurisdiction has been preempted, the Board will discuss how the VoIP traffic in question is treated under state statutes and Board rules. The Board agrees with Iowa Telecom's assertion that when Sprint delivers the VoIP traffic to Iowa Telecom's network, Sprint is acting as a telecommunications carrier and is thus subject to Iowa Telecom's intrastate access tariff and the Board's authority regarding the application of intrastate access charges. Sprint's role in delivering the VoIP traffic to Iowa Telecom's network makes it a "telephone utility," defined in the Board's rule at 199 IAC 22.1(3) as "any person, partnership, business association, or corporation ... owning or operating any facilities for furnishing communications service to the public for compensation." Sprint acknowledges it functions as an interexchange utility.

The Board agrees with Iowa Telecom's rationale for why intrastate access charges properly apply to the VoIP traffic: Iowa Telecom explains that Sprint operates as a common carrier when it delivers voice traffic to Iowa Telecom's network. Iowa Telecom recounts how Sprint and its cable partner MCC have

held themselves out as providers of telecommunications services and have been recognized as such by the Board and the Eighth Circuit Court of Appeals. Because the traffic is intrastate and between exchanges in Iowa, the Board's rule at 199 IAC 22.14(1)"a" (which provides that intrastate access charges shall apply to all intrastate access services rendered to interexchange utilities) and the terms of Iowa Telecom's tariff require the payment of access charges, unless the traffic is non-jurisdictional.

Iowa Telecom relies on the Board's previous conclusion in the *Qwest-Level 3 Arbitration Order* that a voice call between separate LCAs is a toll call and should be treated as such regardless of the technology used for the call, including VoIP. At the time the Board's orders in Docket No. ARB-05-4 were written, the Board was aware of the issues surrounding the regulatory classification of VoIP. In the arbitration order, the Board stated that the "proper classification of VoIP for purposes of intercarrier compensation is an evolving question" but agreed with Qwest that access charges applied. The Board knew in 2005 and 2006 that the FCC's IP-Enabled Services rule making might change the status quo. But the FCC has not yet completed its work and the Board's decision in ARB-05-4 to treat non-nomadic VoIP like any other voice call is still relevant. Ultimately, the FCC may decide in the IP-Enabled Services rule making that the type of VoIP calling involved in this case is an information service subject to exclusive federal regulation, but it could classify such VoIP calling as a telecommunications service. Either way, the FCC has not yet made this

classification and Sprint's decision to stop paying the intrastate access charges under Iowa Telecom's tariff was premature. It would be premature for the Board to try to anticipate any conclusions the FCC might make in the IP-Enabled Services NPRM.

Sprint argues that "it would be bad policy for the Board to penalize carriers for having certificates (or orders in lieu of certificates) by forcing them to bear substantial costs that non-certificated carriers engaged in the same types of service have to bear. Doing so would not only send the wrong regulatory signals, it would distort the competitive marketplace." (Sprint Initial Brief, unnumbered pp. 13-14.)

Contrary to Sprint's policy arguments, Iowa Telecom argues that allowing a carrier using a particular technology to avoid access charges other carriers must pay would be anti-competitive and suggests that it "would not be 'bad policy' to enforce the law just because others are managing to break it." (Iowa Telecom Reply Brief, pp. 9, 16.) Similarly, Consumer Advocate suggests that allowing carriers like Sprint (i.e., those providing non-nomadic VoIP service) to escape intrastate access charges would give them an advantage over their IXC competitors. (Consumer Advocate Brief, p. 13.)

Iowa Telecom and Consumer Advocate's arguments on this point are more persuasive than Sprint's. The Board concludes that any policy concerns raised by Sprint should be resolved in favor of maintaining the present access charge system, which the FCC has not revised at this time (and may not revise in a way that affects this traffic in any

special manner). Support for this conclusion can also be found in the FCC's statements opposing network free riders. (See Iowa Telecom's Initial Brief, p. 23, citing *IP-Enabled Services NPRM* at ¶ 61.)

Further, Sprint's assertion that other carriers are not paying access charges on VoIP traffic raises only a hypothetical concern, and one that is not substantiated in this record. As noted by Consumer Advocate, it is not clear whether Sprint's assertions that other VoIP providers are not paying access charges or are paying charges at lower rates

> refer specifically to Iowa Telecom's interconnections with other VoIP providers, or more generally to the telecommunications industry as a whole, and Sprint has not identified any carriers it believes receive preferential treatment from Iowa Telecom.

(Consumer Advocate Brief, p. 11, referring to the Sprint Complaint at ¶ 3.) On this point, the Board observes that it has not received complaints from other carriers objecting to payment of intrastate access charges on VoIP traffic or seeking payment of unpaid charges on that traffic, as one might expect if large amounts of access services are not being paid for.

Finally, as will be explained below in the discussion of the information services exception, the Board concludes that Iowa Telecom's intrastate access tariff applies because the VoIP traffic in question has not been classified as an information service and thus is properly considered to be a telecommunications service.

The next question to consider is whether the Board's authority to apply its rules regarding intrastate access charges and to consider the present dispute has been preempted. As recently explained by the Maine Public Utilities Commission (MPUC) in a case considering intercarrier compensation for interconnected VoIP services, Congress has the power to preempt state law and preemption occurs

> when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U.S. 141 (1982);

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984).[6]

Sprint contends there are two ways to conclude that the Board's jurisdiction has been preempted: (1) the VoIP services in dispute are information services subject to exclusive FCC jurisdiction or (2) the Board's authority has been preempted under the impossibility exception.

Does the information services exception apply?

There are two classes of services defined by the Act, "telecommunications services" and "information services." Depending upon how a particular service is classified, it will be subject to different regulatory treatments. As discussed above, Iowa Telecom argues the disputed traffic is a telecommunications service. The Act defines telecommunications service in 47 U.S.C. § 153(46) to mean "the offering of telecommunications for a fee directly to the public ... regardless of facilities used."

Sprint argues the disputed traffic is an information service. The Act defines "information service" in 47 U.S.C. § 153(20) to mean "the offering of a capability for generating, acquiring, storing,

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[6] State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Phone" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service, Docket No. 2008-421, "Order," October 27, 2010, (Maine Order), pp. 11-12, citing La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n, 476 U.S. 355, 369-9 (1986).

transforming, processing, retrieving, utilizing, or making available information via telecommunications ... ." In the *Pulver Ruling*, the FCC classified the service at issue known as Free World Dial-Up, or FWD, as an information service,

> stating that FWD is an unregulated information service and any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation.[7]

Thus, an information service classification means the traffic is "interstate," preempted from state regulation, and exempt from intrastate access charges. This is the basis of Sprint's claim of preemption under the information services exception. In its briefs, Sprint traces a 30-year history of rulings to make its case that the disputed traffic is an information service, starting with the FCC's 1980 rulings in the Computer II decision and concluding with the *PAETEC Decision*. Other earlier rulings cited by Sprint are generally cited by the FCC in the 2004 *IP-Enabled Services NPRM*. On the same day the FCC issued the *IP-Enabled Services NPRM*, it also adopted an order classifying Pulver's FWD service as an information service.[8]

Sprint acknowledges that the *Pulver Ruling* dealt specifically with IP-to-IP voice service. (Sprint Reply Brief, footnote 40.) The subject of this complaint is IPPSTN traffic, which is equivalent to IP-TDM.

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[7] Pulver Ruling, ¶ 15.

[8] Pulver Ruling, ¶ 8.

Sprint paints the *Pulver Ruling* broadly, however, stating "there is no indication from the FCC that it would expect any different benefits from IP-PSTN VoIP." (*Id.*) The Board disagrees with Sprint for two reasons. First, the FCC emphasized that its ruling was based on the specific nature of the service at issue:

> We reach our holdings in this Order based on FWD as described by Pulver in its petition and subsequent ex partes. We thus limit the determinations in this Order to Pulver's present FWD offering (only to the extent expressly described below), without regard to any possible future plans Pulver may have.[9]

Second, the FCC indicated that the broader jurisdictional questions about VoIP services would be examined in the *IP-Enabled Services NPRM* issued concurrently with the *Pulver Ruling*.[10] To date, the FCC has not issued rules in that proceeding.

Sprint's principal argument that the disputed traffic in this case is an information service is tied to the concept of "net protocol conversion." Sprint contends that if a service undergoes a net protocol conversion (by originating in IP format and terminating in TDM format) it is an information service subject to exclusive federal jurisdiction. (Sprint Reply Brief, p. 2.)

The FCC discussed the concept of net protocol conversion in the *IP-Enabled Services NPRM*. The FCC notes that it provided the "Stevens Report" to

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[9] Pulver Ruling, footnote 3.

[10] *Pulver Ruling*, ¶ 15.

Congress in 1998; that report considered the proper classification of IP telephony services under the 1996 Act. The FCC observed, however, that in the case of "computer-tocomputer" IP telephony, where "individuals use software and hardware at their premises to place calls between two computers connected to the Internet," the Internet service provider did not appear to be "providing" telecommunications. The Stevens Report stated that a service has the characteristics of telecommunications service so long as four criteria are met:

> (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touchtone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and **(4) it transmits customer information without net change in form or content.**[11]

At the time of the Stevens Report, the FCC declined to render any conclusions regarding the proper legal and regulatory framework for addressing such services, stating that "definitive pronouncements" would be inappropriate "in the absence of a more

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[11] *IP-Enabled Services NPRM*. ¶ 29 (emphasis added).

complete record focused on individual service offerings."[12]

Thus, the *IP-Enabled Services NPRM* became the vehicle the FCC used to determine "whether there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services." Specifically, in that rule making the FCC announced its intent to "examine issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services (collectively, "IP-enabled services")."[13] In other words, whether a particular IP voice service would be considered to be an information service or telecommunications service, and to what extent net protocol conversion is part of that consideration, would presumably be determined through the *IP-Enabled Services NPRM*. The rule making asked numerous questions key to the FCC's determination. As noted above, that rule making has not been completed.

However, in the 2010 *PAETEC Decision*, the federal district court for the D.C. District decided a case based on net protocol conversion alone. The Court said that the FCC, "which has had the (information services vs. telecommunications services) controversy on its docket for a decade, has been unable to decide it."[14] The *PAETEC* Court found net protocol conversion to be the determinative indicator of whether a service is an information service. Sprint relies heavily on the *PAETEC*

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[12] Id.
[13] Id., ¶ 1.
[14] PAETEC Decision, p. 6.

Decision in arguing that the net protocol conversion associated with the disputed traffic makes it an information service subject to FCC jurisdiction. Iowa Telecom characterizes the *PAETEC Decision* as unpublished, non-final, and partial. (Iowa Telecom Reply Brief, p. 7.) The Board agrees with Iowa Telecom's assessment of the *PAETEC Decision*.

Although the FCC has not completed its work in the *IP-Enabled Services NPRM*, it indicated there were numerous issues to be considered in classifying VoIP services as either information services or telecommunications services. The *PAETEC Decision* reduces that multitude of considerations identified by the FCC to a single-pronged test. Under the *PAETEC Decision*, all that needs to happen for a service to be classified as an information service (and thus be subject to federal jurisdiction) is a net protocol conversion. However, in 1998, the FCC declined to render such a broad and definitive conclusion about net protocol conversion in its Stevens Report to Congress.[15] The 12-page *PAETEC Decision* does what the FCC never completed in the IP-Enabled Services docket, and does so without acknowledging any distinction between various types of IP-Enabled services previously identified by the FCC.

Other considerations must guide the Board's determination of how to treat the traffic at issue in this case. Iowa Telecom notes that the FCC expressed the following when it initiated the *IP-Enabled Services NPRM*:

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[15] IP-Enabled Services NPRM, ¶ 29.

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[16]

The FCC seems to have anticipated that some carriers might attempt to discontinue paying access charges based on the issuance of the IP-Enabled Services NPRM. The FCC appears to expect that, absent specific rulings on IP-enabled services, traditional traffic compensation obligations should remain in place.

Sprint argues it is not seeking to deliver traffic without providing compensation. Sprint states that it is asking for the section 251 compensation arrangement ordered by the FCC in the *Time Warner Declaratory Order*.[17] Citing 199 IAC 38.6, Sprint states that the proper compensation corresponding to a section 251 arrangement is "bill-and-keep." (Sprint Reply Brief, pp. 17-18.) What Sprint omits from its discussion, however, is that in the *Time Warner Declaratory Order*, the FCC simply clarified that wholesale carriers associated with Time Warner Cable (a provider of VoIP services) were entitled to interconnect and exchange traffic with incumbent local exchange carriers (ILECs).[18]

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[16] Iowa Telecom Initial Brief, p. 23, quoting IP-Enabled Services NPRM, ¶ 61.

[17] Time Warner Declaratory Order, ¶ 17.

[18] Time Warner Declaratory Order, ¶ 1.

The Time Warner section 251 compensation arrangement referenced by Sprint would have related only to the exchange of local traffic between wholesale carriers and ILECs, not to the exchange of long distance traffic, the subject of this proceeding. In the *Time Warner Declaratory Order*, the FCC declined to determine whether the VoIP traffic at issue in that proceeding was an information service or a telecommunications service, stating this determination would be made in the IP-Enabled Services docket.[19] It is not reasonable to read the order as requiring a reciprocal compensation arrangement for interexchange interconnected VoIP traffic, or as supporting Sprint's suggestion that reciprocal compensation should apply to the VoIP traffic in this case.

Iowa Telecom acknowledges that the 1996 Act introduced a reciprocal compensation mechanism and that the FCC has eliminated the term "local" in its rules under § 251(b)(5) of the Act, but states that reciprocal compensation has only been applied to local traffic and certain interstate calling, while all other interexchange calling is still subject to mechanisms predating the Act. (Iowa Telecom Initial Brief, p. 14, citing *Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 32 (2001) (subsequent history omitted). Further, Iowa Telecom notes that the parties' interconnection agreement excludes traffic subject to access charges from reciprocal compensation. (Iowa Telecom Initial Brief, p. 20, note 14.)

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[19] Time Warner Declaratory Order, ¶ 15.

A conclusion that a reciprocal compensation arrangement is not appropriate for the traffic that is the subject of this proceeding is supported by the Board's rule at 199 IAC 38.6(1), which prescribes bill-and-keep for "local and extended area service calls" and by 199 IAC 38.6(4) which specifically prohibits bill-and-keep for long distance traffic where access charges are payable.

In this proceeding, no one contends the disputed traffic is local traffic. The Board is not persuaded by any of Sprint's arguments that reciprocal compensation is the appropriate form of compensation for interexchange VoIP traffic or that the access charge regime no longer applies to the traffic at issue in this proceeding. In light of the FCC's recent acknowledgement in the National Broadband Plan[20] that the state of the law regarding intercarrier compensation is not settled, the Board disagrees with Sprint's assertions that a bill-and-keep arrangement should be applied to this traffic. In the National Broadband Plan, the FCC recognizes that it has not completed its work on VoIP compensation, stating in Recommendation 8.7 that it should address the treatment of VoIP for purposes of intercarrier compensation. That is inconsistent with Sprint's view that VoIP compensation has already been changed.

In arguing that the traffic at issue in this case is subject to the information services exception, Sprint also cites the *Cable Modem Order*, in which the FCC classified cable modem service as an information

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[20] Federal Communications Commission, *Connecting America: The National Broadband Plan* (released March 16, 2010).

service.[21] The FCC's ruling that cable modem service is an information service was later upheld by the U.S. Supreme Court in its *Brand X Decision*. What is important to note about these two cable modem decisions is that they addressed access to the Internet via cable modem service.[22] The decisions were silent as to whether cable telephony is an information service. The FCC's Cable Modem Order predated the IP-Enabled Services NPRM by nearly two years. Because the regulatory classification of cable telephony was not addressed in the *Cable Modem Order*, the FCC's statement two years later in the *IP-Enabled Services NPRM* is understandable:

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[23]

Sprint's actions were consistent with this 2004 statement from the FCC until the summer of 2009. Apparently, prior to 2009, Sprint was willing to accept that cable telephony was still considered a telecommunications service because its regulatory classification had not been changed by the FCC. In mid-2009, prior to the 2010 *PAETEC Decision*, and without any explicit guidance from the FCC, Sprint

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[21] Sprint Reply Brief, p. 7, citing *Cable Modem Order*.

[22] See *Cable Modem Order*, ¶ 31 and *Brand X Decision*, section I.

[23] *IP-Enabled Services NPRM*, ¶¶ 33, 61.

seems to have decided that cable telephony is an information service, and stopped paying Iowa Telecom's access charges.

The Board finds that Sprint's traffic is jurisdictionally intrastate because the FCC has not ruled that cable telephony is an interstate information service, and, in the end, may not make that classification. The disputed traffic is a telecommunications service subject to Iowa Telecom's intrastate switched access tariff.

Does the impossibility exception apply?

As noted above, the FCC's decision in its *Vonage Declaratory Order* to preempt state regulation was based on the impossibility exception.[24] The impossibility exception comports with the concept of nomadic VoIP discussed in the briefs of Iowa Telecom and Consumer Advocate, although the specific term "nomadic VoIP" is not used by the FCC in its Vonage ruling.[25] Nomadic VoIP and fixed (or non-nomadic) VoIP are distinguished by the Eighth Circuit's Order affirming the FCC's *Vonage Declaratory Order*.[26] Although the Eighth Circuit

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[24] The FCC preempted Vonage's DigitalVoice service under the impossibility exception without determining whether DigitalVoice was an information service. See Vonage Declaratory Order, ¶ 14.

[25] In the Vonage Declaratory Order, the term "nomadic VoIP" is not used. However, the Statement of Chairman Michael K. Powell at the conclusion of the order states that "VoIP services are nomadic and presence-oriented, making identification of the end points of any given communications session completely impractical and, frankly, unwise."

[26] *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

affirmed the impossibility exception for nomadic VoIP, it declined to resolve whether that preemption applies to non-nomadic VoIP services.[27]

The FCC applied the impossibility exception to Vonage because the physical locations of end users could not be known for certain. As the FCC explains below, this makes it impossible to apply the traditional end-to-end analysis necessary to distinguish interstate from intrastate communications:

(Vonage's) DigitalVoice harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. The Internet's inherently global and open architecture obviates the need for any correlation between Vonage's DigitalVoice service and its end users' geographic locations. As we noted above, however, the Commission has historically applied the geographic "end-to-end" analysis to distinguish interstate from intrastate communications. As networks have changed and the services provided over them have evolved, the Commission has increasingly acknowledged the difficulty of using an end-to-end analysis when the services at issue involve the Internet. DigitalVoice shares many of the same characteristics as these other services involving the Internet, thus making jurisdictional determinations about particular DigitalVoice communications based

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[27] Id., at 583.

on an end-point approach difficult, if not impossible.[28]

Iowa Telecom and Consumer Advocate argue that Sprint is delivering nonnomadic VoIP traffic from its cable telephone partners. From a technological and functional perspective, there is no practical distinction between POTS and the type of VoIP service delivered by Sprint as a wholesale carrier for cable telephone companies. (Consumer Advocate Brief, p. 12.) Sprint's willingness to pay access charges on this traffic until 2009 is evidence that an end-to-end analysis for this traffic is possible, i.e., that Sprint is able to identify the geographic endpoint of a call with adequate reliability. The Board concludes that the impossibility exception does not apply to this non-nomadic VoIP traffic because "the interstate and intrastate portions of the service can be ... distinguished."[29]

The Board reaches that conclusion having considered Sprint's suggestion that support for both the information services exception and impossibility exception has increased since 2004. Sprint refers to a federal district court case in which the New Mexico Public Regulatory Commission (NM PRC) argued that the impossibility exception no longer applied to nomadic VoIP because new technology makes it possible to distinguish between intrastate and interstate VoIP traffic. (Sprint Initial Brief, p. 12, citing *New Mexico Pub. Reg. Comm'n v. Vonage Holdings Corp.*, 640 F.Supp.2d 1359 (D.N.M. 2009). The NM PRC sought a declaratory judgment

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[28] *Vonage Declaratory Order*, ¶ 24, footnotes removed.
[29] *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 575.

requiring Vonage to pay into the New Mexico USF. The agency also argued that the FCC Vonage Order should be read to apply narrowly, preempting only state entry regulations and tariff requirements, not USF contribution requirements. Vonage filed a motion to dismiss, which was referred to a federal magistrate judge. The federal Court that reviewed the magistrate's proposed findings rejected the agency's argument that technological improvements made the nomadic VoIP service in question comparable to non-nomadic service. The Court noted that the magistrate judge rejected the argument that the new ability to distinguish between interstate and intrastate VoIP calls rendered the Vonage Order obsolete. The magistrate judge had observed that it is difficult, if not impossible, to determine the exact geographic endpoints of a call and that the question of whether the Vonage Preemption Order was incorrect needed to be decided by the FCC, not the Court. The Court quoted the magistrate's statement that the proper way to determine whether the Vonage Preemption Order was obsolete would be a return to the FCC for review of the order or a direct court challenge to the FCC regarding the order. The Court agreed with the magistrate judge and with the Eighth Circuit's decision that the impossibility exception applies to nomadic VoIP.

However, reading the district court decision in light of the FCC's recent decision regarding state USF contribution requirements imposed on nomadic VoIP providers casts doubt on whether Sprint's reliance on the case is warranted. On November 5, 2010, the FCC released a Declaratory Ruling responding to the petitions from the Nebraska Public

Service Commission (NPSC) and Kansas Corporation Commission for a declaratory ruling that state USF funds may assess nomadic VoIP revenues.[30]

A discussion of the background of the Declaratory Ruling may be helpful. In 2006 the FCC adopted rules requiring interconnected VoIP providers to contribute to the federal USF, concluding that interconnected VoIP providers benefit, as do other contributors, from universal service because the appeal of their services comes from customers being able to place calls to and receive calls from the PSTN. In the 2006 order,[31] the FCC also concluded that requiring interconnected VoIP providers to contribute to the USF promotes the principal of competitive neutrality by reducing the possibility that carriers who had to pay into USF would have to compete with carriers that did not have to pay.

In 2007 the NPSC issued an order requiring interconnected VoIP service providers to contribute to Nebraska's state USF based on intrastate revenues. Vonage challenged the NPSC order in federal district court, which granted Vonage's

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[30] See *In the Matter of Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues,* "Declaratory Ruling," FCC 10-185, WC Docket No. 06-122, Rel. November 5, 2010 (Declaratory Ruling).

[31] *In the Matter of Universal Service Contribution Methodology,* WC Docket No. 06-122, "Report and Order and Notice of Proposed Rulemaking," 21 FCC Rcd 7518 (2006) (Interim Contribution Methodology Order).

request for a preliminary injunction against enforcement of the NPSC Order. NPSC appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed the district court's preliminary injunction, concluding that because the nomadic VoIP service at issue cannot be separated into interstate and intrastate usage, the impossibility exception established Vonage's likely success on the merits of a preemption claim. The court recalled that in the FCC's Vonage Preemption Order, the FCC emphasized that it, not state regulatory agencies, must decide whether certain regulations apply to Vonage's service and other IP-enabled services with the same capabilities. The court said that a reasonable interpretation of that language was that in light of the impossibility of distinguishing between interstate and intrastate nomadic VoIP service, the FCC must have sole regulatory control; while a state could assess a USF surcharge for intrastate VoIP service, the FCC must decide if such a regulation could be applied. The Nebraska and Kansas commissions filed a petition for declaratory ruling from the FCC, asking for a ruling with prospective effect that states are not preempted from assessing universal service contribution requirements on future intrastate revenues of providers of nomadic interconnected VoIP service.

In an opinion dated October 28, 2010, and released on November 5, 2010, the FCC concluded that it should not preempt the imposition of state universal service contribution requirements on future intrastate revenues of nomadic interconnected VoIP providers as long as (1) the state contribution rules are consistent with FCC universal service

contribution rules and (2) the state does not apply its contribution rules to intrastate interconnected VoIP revenues that can be attributed to services provided in another state. The FCC explained that since the 2004 Vonage Preemption Order, it established a mechanism that allows providers of interconnected VoIP service to separate their interstate and intrastate revenues for purposes of calculating federal USF contributions. The FCC's 2006 Interim Contribution Methodology Order established a mechanism for separating interstate and intrastate revenues in the USF context.[32] In the October 28, 2010, order, the FCC states that while the 2006 order did not address preemption, it had implications for the FCC's analysis of the preemption question. The FCC concluded that now that the agency

> has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of calculating universal service obligations, we find no basis at this time to preempt states from imposing universal service contribution

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[32] The 2006 Interim Contribution Methodology Order established three ways of determining a VoIP provider's federal USF contribution amount: 1) a safe harbor provision by which a VoIP provider could presume that 64.9 percent of its revenues come from interstate operations; (2) a VoIP provider could conduct a traffic study to estimate percentage of revenues that can be attributed to interstate traffic and use that percentage to calculate its contribution amount; or (3) providers able to determine the jurisdictional nature of their calls can calculate their federal contribution amounts using actual revenue allocations.

> obligations on providers of nomadic interconnected VoIP service that have entered the market, so long as state contribution requirements are not inconsistent with the federal contribution rules and policies governing interconnected VoIP service.

(Declaratory Ruling, ¶ 15.) The FCC concluded that requiring state USF contributions from interconnected VoIP providers does not conflict with federal policies and may actually promote them. The FCC explained that the providers benefit from state universal service because their customers value being able to place calls to and receive calls from users of the PSTN. The FCC declined to consider the limits of state enforcement authority in this context and stated that nothing in the declaratory ruling affects the agency's conclusions in the Vonage Preemption Order about preemption of rate regulation, tariffing, or other requirements that amount to conditions to market entrance.

In light of the FCC's decision not to preempt states from imposing USF contribution requirements on nomadic VoIP service providers because end points of VoIP calls can be determined, Sprint's suggestion that with the "[d]istinctions diminished [between nomadic and non-nomadic VoIP], there is even less of an argument that the Vonage line of decisions does not apply to all forms of VoIP" is not persuasive. (Sprint Initial Brief, p. 12.) If anything, the FCC's Declaratory Ruling suggests that the FCC recognizes an intrastate jurisdictional element even in nomadic VoIP, making it less likely the Vonage decision applies to all forms of VoIP, not more.

The Board concludes that neither the information services exception nor the impossibility exception prevents the Board from exercising its jurisdiction in this case, i.e, the Board's jurisdiction has not been preempted. Thus, the disputed traffic remains subject to Iowa Telecom's switched access tariff.

Sprint suggested that if the Board has any doubt about the status of the VoIP traffic at issue in this case, it should stay its action pending further FCC action and cites instances where public utility commissions in other states have deferred ruling on this issue pending further action by the FCC. (Sprint Initial Brief, unnumbered page 14.)

Iowa Telecom and Consumer Advocate point to the FCC's UTEX Decision from late 2009 in support of their assertion that the Board can and should resolve this dispute. That case centered on whether the PUC of Texas (PUCT) was preempted from deciding issues involving the compensation for VoIP traffic. UTEX Communications and Southwestern Bell Telephone Company were parties in an arbitration proceeding before the PUCT. The PUCT had abated its arbitration proceeding pending a decision from the FCC regarding the appropriate regulatory classification of VoIP services and the corresponding intercarrier compensation requirements, prompting UTEX to ask the FCC to preempt the jurisdiction of the PUCT and arbitrate the interconnection dispute. UTEX alleged the PUCT had failed to carry out its responsibilities under §

252 of the Telecommunications Act of 1996 (the Act).[33]

In its decision denying UTEX's petition for preemption, the FCC noted that the PUCT had filed a notice stating "[i]f the FCC indicates that the PUCT need not wait for the FCC to make [nationwide determinations on the appropriate regulatory treatment of VoIP services], then the PUCT will complete the arbitration." (UTEX Decision, ¶ 5.) The FCC stated that the PUCT is "best-suited to resolve such matters" and "emphasize[d] that the PUCT should not wait for Commission action to move forward." (Id., ¶ 10.) The Board agrees with Iowa Telecom and Consumer Advocate that the UTEX Decision supports a conclusion that the Board does not need to defer deciding this case.

Utility regulatory commissions in other states are reaching similar conclusions as they resolve disputes involving intercarrier compensation for VoIP traffic in the absence of final conclusive guidance from the FCC. For example, in 2010, the Pennsylvania Public Utility Commission (PPUC) issued a decision in a case presenting similar issues to those being

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[33] The Act identifies a state role in the arbitration of interconnection agreements. 47 U.S.C. § 252(b) allows the incumbent local exchange carrier or any other party negotiating an interconnection agreement to petition a state commission to arbitrate any open issues. Section 252(e)(5) provides that if a state commission fails to act to carry out its responsibilities under § 252, the FCC will issue an order preempting the state commission's jurisdiction after being notified of the state commission's failure to act.

considered by the Board in this proceeding.[34] The PPUC considered a dispute over intercarrier compensation involving the termination of VoIP calls. The complaint alleged that Global NAPs (GNAPs), a CLEC, refused to pay tariffed access charges for interexchange services provided by Palmerton Telephone Company (Palmerton). The PPUC concluded it had subject matter jurisdiction to resolve the dispute. The PPUC found that the function performed by GNAPs of transmitting and indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service over which the PPUC has jurisdiction.

In considering the question of jurisdiction, the PPUC referred to a 2009 decision of the New Hampshire Public Utilities Commission (NH PUC)[35] in which the agency considered an intercarrier compensation dispute. The NH PUC acknowledged that the FCC explained in its Vonage Order that state regulation violates the Commerce Clause where the burden imposed on interstate commerce by such regulation is clearly excessive compared to the local benefits. But the NH PUC emphasized that

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[34] *Palmerton Telephone Company v. Global NAPs South, Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and Other affiliates*, Pennsylvania Public Utility Commission, "Opinion and Order," Docket C-2009-2093336, issued February 11, 2010 (Pennsylvania Order). On July 29, 2010, the PPUC denied Global NAPs' petition for reconsideration.

[35] *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009) (NH PUC Order).

"[p]ayment for services rendered, however, cannot be construed as an excessive regulatory burden." The NH PUC explained that the company seeking payment of access charges was not proposing new regulations that could pose a barrier to market entry. Rather, the company was seeking enforcement of an existing intrastate tariff. The NH PUC explained that

> Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment is an unjust burden for New Hampshire's local exchange carriers, and can create unfair market competition where other carriers are paying for those same services."

(Pennsylvania Order, p. 20, citing NH PUC Order at 18-19.)

The PPUC discussed the FCC's Vonage decision and determined it did not address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN facilities to terminate VoIP calls. The PPUC agreed with the conclusion of the NH PUC that the Vonage Order "primarily affects the potential state role on market entry and regulation of nomadic VoIP providers." (Pennsylvania Order, p. 25.) The PPUC noted that there are costs involved in the termination of any type of traffic Palmerton receives and such costs do not disappear when the traffic includes VoIP calls, whether fixed or nomadic, and Palmerton is entitled to compensation for the traffic.

The PPUC concluded that the indirect transmission of VoIP traffic by GNAPs to Palmerton

constitutes a common carrier telecommunications services which falls within the PPUC's jurisdiction under state and federal law. The PPUC also noted that it has

> adjudicated a number of intercarrier compensation disputes under the premises of applicable Pennsylvania and federal law whether such cases involved the interpretation and enforcement of intrastate carrier access tariffs and/or interconnection agreements. In a similar vein, we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC's conclusions might be.

(Pennsylvania Order, p. 26.)

The PPUC found support for the idea that it can decide cases involving intercarrier compensation for VoIP calls in the FCC's UTEX Decision, citing that case and explaining that though "the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation disputes that may implicate interconnected VoIP." (Pennsylvania Order, pp. 42-43.) Further, the PPUC cited another FCC decision, *North County Communications Corp. v. MetroPCS California, LLC*, File No. EB-06-MD-007 (FCC March 30, 2009), Memorandum Opinion and Order, DA 09-719, for the proposition that the "FCC fully expects state utility

regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters." (Pennsylvania Order, p. 23.)

Another example of a state regulatory agency exercising authority over VoIP traffic is found in a decision issued on October 27, 2010, by the Maine Public Utilities Commission (MPUC).[36] The MPUC decided that non-nomadic VoIP services offered by two companies are "telephone services" under Maine law[37] and subject to state regulation. The MPUC also found that the services in question were telecommunications services, not information

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[36] *State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Phone" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, "Order," October 27, 2010 (Maine Order). It appears that Time Warner Cable, one of the service providers involved in the proceeding, has complied with the Maine Order. In an order issued in Docket No. 2008-421 on January 12, 2011, the MPUC indicated that Time Warner Cable's proposal to provide telephone service through its CLEC affiliate constitutes substantial compliance with the MPUC's October 27, 2010, order. Comcast has appealed the October 27, 2010, order to the Maine Supreme Judicial Court.

[37] Maine's statute at 35-A M.R.S.A. §102 defines "telephone service" as the "offering of a service that transmits communications by telephone, whether the communications are accomplished with or without the use of transmission wires." "Telephone utility" is defined as "every person ... that provides telephone service for compensation" within the state. Another statute, 35-A M.R.S.A. § 8301, provides that cable television companies, "to the extent they offer services like those of telephone utilities subject to regulation by the commission, shall be subject to the commission's jurisdiction over rates, charges and practices ... ."

services, under federal law and that the FCC had not preempted the MPUC's regulatory authority to regulate the services.

The MPUC had initiated an investigation into the regulatory status of the nonnomadic VoIP services offered by Time Warner Cable Digital Phone L.L.C. (TWC) and Comcast IP Phone, L.L.C. (Comcast). Maine's Office of Public Advocate (OPA) argued that the FCC had not preempted the authority of the MPUC to regulate the VoIP service. According to the OPA, there has been no express statement by either Congress or the FCC of an intent to preempt state regulation of the service; state regulation of the service would not conflict with federal policy because there is no federal licensing or consumer protection requirements that apply to the service; and neither Congress nor the FCC has occupied the field of regulation of IP-based services. (Maine Order, p. 6.)

The companies argued that even if the service is properly included in the state's definition of "telephone services," federal law preempts application by the MPUC of the state statutes to the VoIP services. Comcast argued that its VoIP service is an information service in that involves a net protocol conversion and that the calling features of its services are intertwined with other computing and information service functions as part of an integrated service offering. TWC argued that the preemptive effect of the FCC's Vonage Order is not limited to nomadic VoIP services but applies to any state PUC attempt to regulate any VoIP service which requires a broadband connection and use of

IP-compatible equipment at the user's location and that offers a suite of integrated capabilities.

The MPUC concluded that the VoIP service offered by the companies falls within Maine's statutory definition of "telephone service" and that federal law does not preempt the authority of the MPUC to enforce the state's regulatory scheme as applied to the VoIP service. The MPUC interpreted the phrase, "transmits communications by telephone," to be "agnostic with respect to how a call is transmitted or processed." The MPUC also found that the public policy purposes behind Maine's statutes were advanced by applying the regulatory requirements to VoIP service, especially since VoIP is promoted as a substitute for traditional telephone service.

The Maine PUC discussed the Eighth Circuit's decision affirming the FCC's Vonage Order.[38] The MPUC acknowledged that the court found that the FCC's conclusion that state regulation of VoIP service would interfere with valid federal rules or policies was entitled to "weight," and was not arbitrary or capricious. The MPUC emphasized, though, that the court limited the scope of its decision to "to the issue [of] whether the FCC's determination was reasonable based on the record existing before it at the time," and further noted that "[i]f, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined." *Id.* at 580.

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[38] *Minn. Pub. Utils Comm'n v. FCC*, 483 F.3d 570 (8th Cir.)

The MPUC referred to the Court's observation that subsequent to the Vonage Order, the FCC noted in a case involving VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated:

> An interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer quality for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.

(Maine Order, p. 16, citing *Minn. Pub. Utils Comm'n v. FCC, 483 F.3d 570, 581 (8th Cir. 2007), citing Universal Serv. Contribution Methodology,* 21 F.C.C.R. 7518 at 7546 ¶ 56(2006)).

The MPUC concluded its statutory authority to regulate the VoIP services at issue had not been preempted. The MPUC stated that it was obligated to fulfill its role in regulating telecommunications to ensure safe, reasonable, and adequate service at just and reasonable rates and that to refrain from performing that role "in anticipation of a possible future order by the FCC that may, or may not, have the effect of validly preempting our authority would be to engage in 'preemptive preemption' – a path that we have in the past found inconsistent with our responsibilities." (Maine Order, p. 17.)

B. Did Sprint properly dispute Iowa Telecom's switched access charges as permitted by Iowa Telecom's tariff?

Summary of the parties' positions

Iowa Telecom

Iowa Telecom argues that if the Board agrees with Sprint, it would effectively be rewriting Iowa Telecom's tariff to sanction customer nonpayment whenever a customer states there is a dispute and refuses to pay. According to its tariff, once Iowa Telecom denies a dispute, any withheld amounts relating to the dispute become past due and payable. If Sprint disagrees with Iowa Telecom's position, it must pay but would be entitled to bring the issue to the Board in a complaint filing. (Iowa Telecom Initial Brief, pp. 7-8.)

Iowa Telecom states that federal and state policies disfavor self-help of the type in which Sprint has engaged and Board precedent holds that Sprint must directly challenge the tariff, not withhold access charge payments after Iowa Telecom denies a dispute. The common carrier obligation creates a balance which obligates the carrier to provide service according to its tariff and obligates the customer to pay the charges in the tariff. Because significant private investment dollars are spent on the network by the company, allowing the customer to skew this careful balance by allowing it to decide whether to pay undermines the carrier's opportunity to recover its investment and the carrier's willingness to be exposed to the risks created by the investment. (Iowa Telecom Initial Brief, pp. 8-9.)

According to Iowa Telecom, Sprint admits to withholding undisputed access charge payments in addition to disputed ones. Iowa Telecom argues Sprint's actions are unreasonable, violate Iowa Telecom's tariff, and serve as legitimate grounds for disconnection of services for nonpayment.

Iowa Telecom explains that its tariff grants customers a period of time in which to dispute past bills, but does not permit such customers to withhold payment for undisputed billings in order to "make up" for past payments that were never originally disputed. Its tariff creates a balance where undisputed amounts must be paid on time, while permitting a customer to temporarily withhold disputed amounts until Iowa Telecom can review the legitimacy of the dispute. Sprint provides no support for its supposed right to violate the tariff in this way. And given federal and state policy against self-help, withholding undisputed amounts is especially offensive. The careful balance created by the common carrier relationship is further undermined if customers are allowed to reverse a previously paid amount for months past. Sprint's retroactive practice distorts accounting procedures, where books could already be closed for the retroactive period raised. (Iowa Telecom Initial Brief, p. 10.)

Iowa Telecom suggests that Sprint's justification of its unlawful practice of using an "Accounts Payable (AP) Debit Balance" account, withholding current undisputed amounts due in order to repay itself for previously made payments, is merely a smoke screen to cover its violation of Iowa Telecom's tariff. According to Iowa Telecom, its tariff does not

permit maintaining a self-help AP Debit Balance account. If the tariff allowed reversing previously paid amounts, there would have to be language permitting it such as there is with temporarily withholding payment on unpaid disputed amounts. Iowa Telecom argues that Sprint's practice violates the filed rate doctrine and policies against self-help and preservation of telephone company financial expectations.

Iowa Telecom suggests that the essence of the filed rate doctrine is that the tariff terms dictate the proper recourse of the customer and the customer is not free to devise its own procedures that contradict the terms of the tariff. Further, proper economic incentives dictate that all customers with good faith billing disputes be allowed only to withhold payment temporarily. Allowing customers to unilaterally take revenue would undermine the financial structure that was established to permit Iowa Telecom to build a reliable network to benefit its customers, including Sprint. Iowa Telecom argues that because its tariff only contemplates temporary withholding of unpaid disputed amounts, the Board should rule that a customer cannot create retroactive withholdings through an AP Debit Balance account. (Iowa Telecom Reply Brief, p. 4.)

Consumer Advocate

According to Consumer Advocate, end-user customers are the ones most affected by a carrier dispute which carries a potential for disconnection of service. Consumer Advocate submits that carriers involved in economic disputes with other carriers should not be permitted to resort to either protracted

withholding of payment or call blocking except as a last resort and only after obtaining Board permission.

In response to Sprint's claims it was entitled to withhold and offset access payments under the provisions of the tariff regarding disputed payments and Iowa Telecom's position that it was entitled to demand payment since it denied Sprint's dispute, Consumer Advocate states that it should have been clear to both carriers that their commercial dispute would need to be resolved by the Board or some other authority. Consumer Advocate states that the Board has clearly disfavored self-help actions by carriers, including both withholding payment and call blocking. Sprint's invocation of the disputed billing procedure under Iowa Telecom's tariff provision was denied by Iowa Telecom. If Sprint believed that either Iowa Telecom's denial was not correct or that Iowa Telecom was not entitled to resolve the billing dispute, Consumer Advocate argues that Sprint should have brought the matter to the Board rather than continue to withhold payment without the Board's permission. (Consumer Advocate Brief, pp. 14-17.)

Sprint

Sprint asserts that disputing Iowa Telecom's VoIP charges was appropriate as Sprint properly withheld disputed amounts as expressly permitted by the Iowa Telecom tariff. Sprint admits it had been paying Iowa Telecom for traffic that included VoIP traffic but explains that competitive pressures and further developments in the law prompted it to reevaluate its practice. Sprint claims that when it

decided to challenge the traffic, it properly disputed the access charges for VoIP traffic under the terms of Iowa Telecom's tariff at Section 2.4.1(D)(2). According to Sprint, the tariff anticipates that disputed amounts may be withheld, with the consequence of doing so being the potential to pay late fees should Iowa Telecom prevail. The tariff also has provisions for disputes raised more than six months after the billing in question. (Sprint Initial Brief, unnumbered pp. 2 -4.)

Sprint denies not paying undisputed amounts as alleged by Iowa Telecom. Sprint explains that it has established an AP Debit Balance account, which occurs when Sprint disputes inappropriate amounts that it has overpaid for a past period. Sprint places the value of those amounts on its books as an amount owed from Iowa Telecom as amounts wrongfully paid. If overpayment amounts are substantial, they may be larger than the "undisputed" charges in the current period. In that case, Sprint enters the current undisputed charges in the Accounts Payable system to reduce the overpayment amounts and if overpayment amounts still remain, there is no current account payable amount owed to Iowa Telecom. (Sprint Initial Brief, unnumbered pp. 4-5.)

Sprint contends that its use of the debit balance account is consistent with Iowa Telecom's own tariffs, makes accounting sense, and benefits Iowa Telecom in that Iowa Telecom has had the use of Sprint's overpayments and thus any revenues from the time-value of that money. Further, as a policy matter, the Board should not preclude the use of

debit balance accounts. Sprint cites the complaint case in Board Docket No. FCU-07-2, *Qwest v. Superior, et al.*, stating that no refunds have been made in that case because the money had already been invested in plant and other illiquid assets. Sprint suggests that the best way to assure a prevailing carrier receives a proper refund to make it whole is to remove control over that money from the receiving party so that it cannot be spent. (Sprint Initial Brief, unnumbered pp. 6-7; Sprint Reply Brief, pp. 34-35.)

Sprint argues that in this circumstance, withholding is permitted as part of the approved dispute resolution process in the tariff, and is not an act of unilateral withholding as is Consumer Advocate's apparent concern. Sprint suggests that by having unilateral authority to both assess charges and then determine whether those charges are legitimate, Iowa Telecom would serve as both prosecutor and judge. According to Sprint, this leaves the right to dispute resolution meaningless and results in situations where Sprint paid improperly assessed charges and now cannot recover those overpayments, as is the case in Docket No. FCU-07-2. Sprint contends that when an ILEC has unilateral control over the payment stream, there is no protection for the competitors' ability to recover overpaid amounts. Sprint seeks a better balance of financial protection. Sprint argues that it appropriately withheld under the tariff and Iowa Telecom inappropriately responded with a threat to block traffic.

Discussion

According to the Sprint Complaint, in July 2009, Sprint determined that Iowa Telecom had been assessing traditional terminating access charges on VoIP traffic. Sprint claims it properly disputed those charges by withholding the disputed amounts. As described above, Sprint also established an AP Debit Balance account by placing on its books the value of the amounts Sprint determined it had overpaid for a past period as if they were amounts *owed* to Sprint from Iowa Telecom. Apparently the "overpayment" amounts were larger than the undisputed charges owed to Iowa Telecom, which, according to Sprint, resulted in no current account payable amount owed to Iowa Telecom.

Iowa Telecom claims that by using its AP Debit Balance account, Sprint was unlawfully withholding undisputed amounts. However, it appears from e-mail correspondence that was attached to the complaint (Sprint Complaint, Attachment B) that Sprint agreed to return to paying current charges not in dispute on December 23, 2009.

Iowa Telecom claims that as of January 15, 2010, Sprint had withheld $793,000 of both intrastate and interstate switched access charges. (Iowa Telecom Answer and Motion for Injunctive Relief, paragraph 1, filed January 19, 2010.) It is not clear how much of the $793,000 is allocated to the intrastate jurisdiction, but this proceeding was not intended to determine the precise amounts in dispute. It is also unclear whether Sprint still maintains its AP Debit Balance account even after agreeing to pay current charges not in dispute, as noted above.

Iowa Telecom's tariff implies that only disputed amounts can be withheld, but does not directly state that undisputed amounts must be paid. In a section describing late payment charges, the tariff describes several scenarios which involve disputed, withheld amounts. For example, the tariff states at Section 2.4.1(D)(1): "A late payment charge will apply to disputed amounts withheld pending settlement of the dispute if it is determined in the Telephone Company's favor." Further, the tariff does not appear to give a specific time frame in which disputes must be filed with Iowa Telecom, although it contemplates as much as a six month timeframe for submitting "a documented claim for the disputed amount." (Iowa Telecom tariff, Section 2.4.1(D)(2).)[39]

Because the tariff includes language regarding the treatment of disputed amounts, it contemplates the payment of undisputed amounts. Further, the timely payment of undisputed amounts is a common practice for all types of business transactions. Therefore, Sprint acted inappropriately by establishing its AP Debit Balance account which, in effect, withheld amounts Sprint had not disputed.

Sprint complains that Iowa Telecom's "unilateral authority" in its tariff to both assess charges and then determine whether those charges are proper creates a situation whereby Iowa Telecom is both prosecutor and judge, providing no protection for the

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[39] Iowa Telecom attached selected provisions of its tariff as Attachment A to its January 19, 2010, "Answer and Motion for Injunctive Relief." Those provisions are attached to this Order, identified as Appendix A.

competitor's ability to recover overpaid amounts. (Sprint Reply Brief, p. 34.) If Sprint disagrees with this or any other language in Iowa Telecom's tariff, Sprint should have objected to the tariff.

The Board agrees with Consumer Advocate's suggestion that neither party is without blame. It should have been obvious to the parties that their dispute would need to be resolved by either the Board or some other authority. Both parties resorted to self-help actions, which the Board does not favor. As Consumer Advocate emphasizes, the Board "has made clear its disfavor of self-help actions by carriers, including both withholding payment and call blocking." Consumer Advocate cites the Board's statement in Docket No. FCU-07-2 that "unilaterally withholding payment is not a preferred form of dispute resolution in economic disputes between carriers unless it its clearly contemplated under the applicable dispute resolution provisions ... ."[40] The tariff at issue in this case contemplated withholding of disputed balances but did not contemplate Sprint's use of an AP Debit Balance account. Sprint's use of the debit balance account amounted to unilateral withholding of undisputed payments. The Board concludes that by using an AP Debit Balance account, Sprint did not properly dispute Iowa Telecom's switched access charges as permitted by Iowa Telecom's tariff.

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[40] Consumer Advocate Brief, p. 15, citing *Qwest Communications Corp. v. Superior Tel. Cooperative et al.*, Docket No. FCU-07-2, "Final Order," p. 70, issued September 21, 2009.

C. Can a local exchange carrier (Iowa Telecom) disconnect a wholesale customer (Sprint) without Board approval?

Summary of Parties' Positions

Iowa Telecom

Iowa Telecom argues it is entitled to disconnect wholesale customers for nonpayment, without Board approval, after it has rejected a dispute, contrary to Sprint's underlying premise that Iowa Telecom must seek Board approval prior to disconnecting Sprint access service. (Iowa Telecom Initial Brief, pp. 3-7; Iowa Telecom Reply Brief, pp. 2-3.)

Iowa Code § 476.20(1) and the Board's rules at 199 IAC 22.16 generally require a carrier to get permission from the Board to "discontinue, reduce, or impair service to a community, or part of a community." Iowa Telecom points out, though, that the subsection and rule make an exception for "nonpayment of account or violation of rules and regulations." Iowa Telecom's position is that state law and the Board's rules specifically permit disconnection in this instance. (Iowa Telecom Initial Brief, pp. 3-4; Reply Brief, pp. 2-3.)

According to Iowa Telecom, the Board's analysis in *Qwest Corp. and U.S. Cellular Corp. v. East Buchanan Tel. Coop.*, Docket Nos. FCU-04-42, FCU-04-43, "Order Granting Injunctive Relief," (December 23, 2004) (*East Buchanan*), confirms that a carrier may disconnect a wholesale customer without prior Board approval in appropriate circumstances. In *East Buchanan*, Iowa Telecom argues, the Board recognized that if bills were sent to the carrier and

not paid, then disconnections without Board approval would have been permitted under the statutory exception. Iowa Telecom argues that none of the reasons why East Buchanan was not permitted to disconnect apply to the present case. (Iowa Telecom Initial Brief, p. 4; Iowa Telecom Reply Brief, p. 3.)

Iowa Telecom also argues that like all other carriers' tariffs, its tariff allows disconnection of a customer's services for nonpayment after written demand has been given and the customer does not comply. Section 2.1.8(A) of Iowa Telecom Tariff No. 2 clearly permits Iowa Telecom to disconnect intrastate access customers upon 15 days written notice for, among other reasons, failure to comply with the timely payment provisions of Section 2.4.1(D).

Iowa Telecom also argues that carriers have the obligation to comply with 199 IAC 22.14(1)"b," which requires carriers to discontinue service to IXCs that do not pay the CCLC. The rule states that if communication is made without compliance with the rule, the telephone utility shall terminate service after notice is given. There is no statutory or regulatory requirement that the carrier obtain prior approval. Iowa Telecom suggests that it makes no sense for a Board rule to require carriers to take a particular action in response to a customer's failure to pay the CCLC if, at the same time, the Board was requiring such carriers to seek prior Board approval for disconnection.

Iowa Telecom contends that Sprint has misused the emergency injunctive relief provision of Iowa

Code § 17A.18A. A customer that waits long enough to seek relief from the Board under this subsection will always be able to manufacture an apparent emergency and force Board intervention until the Board can consider the merits of the dispute. By Sprint's own admission, it knew of the potential disconnection date two weeks prior to seeking any clarification from Iowa Telecom. Sprint then waited and came to the Board with an emergency complaint to prevent disconnection that would occur on the following day.

According to Iowa Telecom, it is illogical to implement Iowa Code § 17A.18A as a "trump" to customer service disconnection found in Iowa Code § 476.20(1) in every instance, because any customer could make a superficial showing that there is an "immediate danger to the public health, safety, or welfare requiring immediate agency action." All customers rely, to some extent, on their telephone service for contacting hospitals, doctors, and the police. However, this reliance is relatively limited in the case of toll service, the subject of this case.

Iowa Telecom acknowledges that it would be less disruptive to end-user customers to seek Board approval prior to disconnecting a wholesale customer, as suggested by Consumer Advocate. But Iowa Telecom emphasizes that neither Iowa law nor Board rules or precedent unconditionally prohibit disconnection of a wholesale customer for nonpayment.

Iowa Telecom argues that unlike the *East Buchanan* case, where U.S. Cellular had not been billed by East Buchanan, Iowa Telecom has a long-

standing account relationship with Sprint, has sent bills to Sprint, and Sprint is unlawfully refusing to pay the bills under this account. Sprint also claims that it has a commercial dispute like that in *East Buchanan*. However, Iowa Telecom asserts that, under the facts now before the Board, *East Buchanan* would have been decided differently if there had been proper billing and an account relationship. (Iowa Telecom Reply Brief, p. 3.) Iowa Telecom suggests that Sprint is not situated similarly to the affected carriers in *East Buchanan*, and cannot avoid the plain language of Iowa Code § 476.20(1).

Consumer Advocate

Consumer Advocate explains that the Board has found carrier actions that amount to call-blocking to be improper, referring to the Board's finding in Docket No. FCU-07-2 that a carrier's actions amounted to call blocking, thus warranting notice that subsequent findings of call blocking would result in civil penalties. Consumer Advocate also refers to the Board's decision in *East Buchanan*, in which the Board stated that "it appears that blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or welfare, because the blocking carrier cannot promise, let alone guarantee, that it will block only non-emergency calls." The Board also stated in that decision that "blocking should not be used as a means of forcing action in a commercial dispute."[41] If Iowa Telecom believed its discussions

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[41] In *Re: Qwest Corporation and U.S. Cellular Corporation v. East Buchanan Telephone Cooperative*, Docket Nos. FCU-04-42,

with Sprint were not productive, it could have brought the matter to the Board for permission to disconnect, as other carriers have done. Consumer Advocate's position is that the carriers' delay in seeking resolution of the dispute and their use of self-help remedies of withholding payment and threatening disconnection puts the service of direct and indirect end-user customers of both carriers at risk.

Sprint

Sprint argues that Iowa Telecom's attempt to block live traffic as a means to negotiate a compensation dispute is clearly contrary to established Board precedent. Sprint refers to the Board's statement in *East Buchanan* that because a carrier cannot guarantee that it will block only non-emergency calls, "blocking should not be used as a means of forcing action in a commercial dispute," because "blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or welfare." Sprint anticipated Iowa Telecom's argument that, unlike *East Buchanan*, its tariff permitted disconnection for non-payment. But Sprint asserts it did not violate Iowa Telecom's tariff by withholding disputed amounts. Further, Sprint argues that Iowa Telecom did not avail itself of any of the options outlined by the Board in the *East Buchanan* order for resolution of a commercial dispute, whether through

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FCU-04-43, "Order Continuing Temporary Injunction, Docketing and Consolidating Cases, and Setting Procedural Schedule," p. 8, issued September 14, 2004.

negotiations, complaint proceedings before the Board, arbitration and court cases. Sprint asks the Board to reiterate that it is unreasonable to block or threaten to block to obtain leverage in a commercial dispute.

Sprint argues that although Iowa Telecom goes to great lengths to distinguish this case from the *East Buchanan* case, there is nothing Iowa Telecom can do to avoid its central premise that blocking calls will almost always present an immediate danger to the public health, safety, or welfare. Nor can Iowa Telecom legitimately deny that it threatened to block traffic for the inappropriate reason of forcing action in a commercial dispute.

Sprint asserts that Iowa Telecom has not presented any plausible argument or evidence showing that Sprint was trying to delay the dispute resolution process in order to create an "emergency." The conditions for the emergency adjudicative proceedings in Iowa Code § 17A.18A were created solely by Iowa Telecom's decision to block traffic.

Sprint argues that, as suggested by Iowa Telecom, the applicability of Iowa Code § 476.20 may be limited by the Board's reasoning in *East Buchanan*. However, Sprint argues that should not trouble the Board because the Iowa Supreme Court upheld the Board's use of § 17A.18A in *East Buchanan* to protect the health and welfare of Iowans when call blocking is threatened. And although the Board's use of § 17A.18A limits Iowa Telecom's ability to exercise its alleged rights under Iowa Code § 476.20 against other carriers, it protects

the rights of Sprint and its joint providers' end-user retail customers.

Sprint notes that the provisions of § 476.20 and § 17A.18A can be harmonized. The key is that there has to be reasonable notice given prior to blocking so that § 17A.18A need not be used. Blocking should remain difficult and highly disfavored. Because blocking inflicts pain on the innocent end users of Iowa Telecom, Sprint, or Sprint's VoIP partners, the issues should be resolved between the disputing parties without impacting those innocent end users, as the Board has consistently held.

Discussion

The Board's decision in Docket No. SPU-02-09, *Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom*,[42] is relevant to the call blocking issue in this case. In that case, Iowa Telecom filed a request for approval to disconnect access services being provided to WorldCom, Inc. (WorldCom). In its order issued July 2, 2002, the Board stated at page 2:

> Iowa Telecom does not allege those customers [end-user customers who have chosen WorldCom as their primary interexchange carrier] have failed to pay their accounts or violated any rules or regulations, so it appears Iowa Telecom cannot

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[42] In Docket No. SPU-02-9, Iowa Telecom alleged it had the right, pursuant to its intrastate access tariff, to demand a deposit and, upon WorldCom's failure to provide a deposit, to discontinue providing intrastate access services to WorldCom, based upon WorldCom's payment history and "precarious financial health."

> discontinue access services to WorldCom unless and until permission to do so is obtained from the Board, because of the inevitable impairment of service that would be suffered by other customers.

Further, in its order in the same case issued July 12, 2002, the Board stated at page 3:

> [T]he Board is concerned about the potential impact of any disconnection on the Iowa Telecom local exchange customers who have chosen WorldCom to provide their intrastate interexchange services. The Board notes that Iowa Code § 476.96 includes access to switched exchange services as a part of the basic local telephone service that Iowa Telecom is obligated to provide to its customers. If Iowa Telecom discontinues providing intrastate access services to WorldCom, then those customers will not have access to switched interexchange, intrastate services, at least on a "1+" basis. Thus, Iowa Telecom's proposal to discontinue service to WorldCom is also a proposal to reduce the level of local exchange service provided by Iowa Telecom to its customers who have presubscribed to WorldCom's intrastate interexchange service. The Board will not approve that change without first considering the potential impact on the public interest.

Those same public interest concerns apply in the current case. Iowa Telecom's argument is that because bills were sent to Sprint (unlike the *East Buchanan* case), it is entitled under its tariff to disconnect Sprint without prior Board approval. The Board disagrees with Iowa Telecom's position on this

point. As pointed out by Consumer Advocate, end-user customers are most affected by a carrier dispute which carries a potential for disconnection of service. Iowa Code § 476.101(9) provides that a telecommunications carrier shall not take any action that disadvantages a customer who has chosen to receive service from another carrier. Iowa Telecom's proposed blocking would disadvantage customers who choose to take intrastate interexchange service from Sprint in order to make calls terminating in Iowa Telecom's service territory. The Board also agrees with Consumer Advocate's assertion that carriers involved in economic disputes with other carriers should not be permitted to resort to call blocking except as a last resort and then only after obtaining Board permission.

The *East Buchanan* case is helpful when evaluating the blocking issue in the current case, but not in the light presented by Iowa Telecom. In *East Buchanan*, the Board concluded that blocking almost always presents an immediate danger to the public health, safety, or welfare, since the carrier cannot guarantee that it will block only non-emergency calls. The *East Buchanan* decision provides some insight as to when blocking without prior Board approval may be appropriate. In footnote 2 of the Board's order issued September 14, 2004, the Board listed two examples: (1) when the actions of one carrier are causing significant and serious safety problems on another carrier's network and (2) when one carrier has been properly billed for services rendered by a second carrier, but the first carrier refuses to pay the bills resulting in a serious and immediate danger to the second carrier's financial

health. The facts of the present case before the Board do not fit within either of these examples. Consistent with prior Board statements disapproving call blocking as an option in a commercial dispute, the Board concludes that Iowa Telecom cannot disconnect a wholesale customer on these facts without prior Board approval.

SUMMARY OF BOARD CONCLUSIONS

As explained in the discussion above, the Board finds that Sprint's VoIP traffic discussed in this case is jurisdictionally intrastate and subject to state regulation and Iowa Telecom's intrastate switched access tariff. The Board concludes its jurisdiction has not been preempted because the FCC has not ruled that cable telephony is an interstate information service and because the impossibility exception does not apply to the traffic at issue in this proceeding.

Further, the Board concludes that by using an AP Debit Balance account, Sprint did not properly dispute Iowa Telecom's switched access charges as contemplated by Iowa Telecom's tariff. The Board also concludes that Iowa Telecom cannot disconnect a wholesale customer such as Sprint, in circumstances as described in the present case, without prior Board approval. The potential harm to end user customers of the wholesale carrier warrants requiring the carriers to bring this type of dispute to the Board or pursue other appropriate action before blocking calls. The Board will direct Sprint to repay amounts owed to Iowa Telecom in compliance with Iowa Telecom's switched access tariff and will direct

the parties to file a joint status report when the payment is received by Iowa Telecom.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Within 30 days of the date of this order, Sprint Communications Company L.P. shall pay Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, now known as Windstream Iowa Communications, Inc., amounts owed for unpaid intrastate access charges in compliance with Iowa Telecom's switched access tariff.

2. Within ten days of payment made pursuant to this order, the parties shall file a status report with the Board.

UTILITIES BOARD

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper

/s/ Darrell Hanson

Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 4th day of February 2011.

FILED WITH
Executive Secretary
January 19, 2010
IOWA UTILITIES BOARD

ATTACHMENT A
Selected Provisions of Iowa Telecom Tariff
Iowa No. 2

IOWA No. 2
FACILITIES FOR INTRASTATE ACCESS
Iowa Telecommunications Services, Inc.
d/b/a Iowa Telecom **2nd Revised Sheet 30**
Telephone Tariff **Cancels 1st Revised Sheet 30**
Filed with Board

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Telephone Company (Cont'd)

2.1.8 Discontinuance and Refusal of FIA

(A) Unless the provisions of 2.2.2(B) following apply, if the customer fails to comply with the provisions of 2.1.6 preceding or 2.3.1 following, and 2.4.1 (A) and (D) following, including any payments to be made by it on the dates or at the times herein specified, and fails within fifteen (15) days after written notice, by Certified U.S. mail, from the Telephone Company to a person designated by the customer to correct such noncompliance, the Telephone Company may discontinue the provision of the FIA to the noncomplying customer. In case of such discontinuance, all applicable charges shall become due.

(B) If the customer repeatedly fails to comply with the provisions of this tariff in connection with the provision of a FIA or group of FIA, and fails to correct such course of action after notice as set forth in (A) preceding, the Telephone Company may

refuse applications for additional FIA to the noncomplying customer until the course of action is corrected.

2.1.9 Preemption of FIA

In certain instances, (i.e., when spare facilities and/or equipment are not available), it may be necessary to preempt existing services to provision or restore National Security Emergency Preparedness (NSEP) Services. If, in its best judgement, the Telephone Company deems it necessary to preempt, then the Telephone Company will ensure that:

(A) A sufficient number of public switched services are available for public use if preemption of such services is necessary to provision or restore NSEP service.

(B) The service(s) preempted have a lower or do not contain NSEP assigned priority levels.

(C) A reasonable effort is made to notify the preempted service customer of the action to be taken.

(D) A credit allowance for any preempted service shall be made in accordance with the provisions set forth in Section 2.4.4(A).

IOWA No. 2
FACILITIES FOR INTRASTATE ACCESS
Iowa Telecommunications Services, Inc.
d/b/a Iowa Telecom **2nd Revised Sheet 34**
Telephone Tariff **Cancels 1st Revised Sheet 34**
Filed with Board

2. GENERAL REGULATIONS (Cont'd)

2.3 Obligation of the Customer (Cont'd)

2.3.9 Coordination With Respect to Network Contingencies

The customer shall, in cooperation with the Telephone Company, coordinate in planning the actions to be taken to maintain maximum network capability following natural or man-made disasters which affect telecommunications services.

2.4 Payment Arrangements and Credit Allowances

2.4.1 Payment of Charges and Deposits

(A) The Telephone Company may, in order to safeguard its interests, require a customer which has a proven history of late payments to the Telephone Company or does not have established credit, to make a deposit prior to or at any time after the provision of the FIA to the customer to be held by the Telephone Company as a guarantee of the payment of rates and charges. Furthermore, if the Telephone Company shall at any time have sufficient information to reasonably believe that the prospect of due and punctual payment of

the service is impaired, then in such event, the Telephone Company may, at its option, require payment of deposit. A deposit may not exceed the actual or estimated rates and charges for the FIA for a two month period. The fact that a deposit has been made in no way relieves the customer from complying with the Telephone Company's regulations as to the prompt payment of bills. At such time as the provision of the FIA to the customer is terminated, the amount of the deposit will be credited to the customer's account and any credit balance which may remain will be refunded. After the customer has established a one year prompt payment record, such a deposit will be refunded or credited to the customer account at any time prior to the termination of the provision of the FIA to the customer. In case of a cash deposit, for the period the deposit is held by the Telephone Company, the customer will receive simple annual interest at the percentage rate specified in the Telephone Company General and/or Local Tariff.

(B) Where the provision of FIA requires facilities that meet any of the conditions specified in 10.1.1 following, Special Construction charges as set forth in Section 10 will apply.

(C) The Telephone Company shall bill FIA services on a current basis for (a) all charges incurred, (b) applicable taxes, and (c) credits due the customer.

(1) Switched Access (except for the Entrance Facility, Direct-Trunked Transport and Multiplexing elements), Ancillary and Miscellaneous services shall be billed in arrears.

(2) Switched Access Entrance Facility, Direct-Trunked Transport and Multiplexing elements shall be billed in advance except for the charges and credits associated with the initial or final bills. The initial bill will also include charges for the actual period of service up to, but not including, the bill date. The unused portion of the FIA already billed will be credited on the final bill.

The customer will receive its bill in; 1) a paper format or 2) a paper format bill summary with a magnetic tape to provide the detailed information of the bill. Such bills are due when rendered. Adjustments for the quantities of FIA established or discontinued in any billing period beyond the minimum period set forth in 2.4.2 following will be prorated to the number of days based on a 30 day month. The Telephone Company will, upon request and if available, furnish such detailed

information as may reasonably be required for verification of any bill.

Issued: July 1, 2005
Effective: August 1, 2005

Issued By: D. M. Anderson
Vice President-
External Affairs

IOWA No. 2
FACILITIES FOR INTRASTATE ACCESS
Iowa Telecommunications Services, Inc.
d/b/a Iowa Telecom **1st Revised Sheet 35**
Telephone Tariff **Cancels Original Sheet 35**
Filed with Board

2. GENERAL REGULATIONS (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Charges and Deposits (Cont'd)

(D) All bills to the customer are due when rendered and are considered past due thirty-one (31) days after the bill date. In the event the customer does not remit payment in immediately available funds within the 30 day period, the FIA may be discontinued as specified in 2.1.8 preceding.

(1) If the entire amount billed is not received by the Telephone Company in immediately available funds within thirty (30) days after the bill date, an additional charge (late payment charge) equal to 1/12th of the percentage rate for deposit interest as that set forth in 2.4.1(A) of the unpaid balance will be applied for each month or portion thereof that an outstanding balance remains.

A late payment charge will apply to disputed amounts withheld pending settlement of the dispute if it is determined in the Telephone Company's favor. The Telephone Company will credit or assess late payment charges for disputed amounts as set forth in 2.4.1(D)(2).

Each customer will be given a waiver of the late payment charge once per each calendar year.

If such payment date would cause payment to be due on a Saturday, Sunday or Holiday (i.e., New Year's Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, the second Tuesday in November and a day when Washington's Birthday, Memorial Day or Columbus Day is legally observed), payment for such bills will be due from the customer as follows:

If such payment date falls on a Sunday or on a Holiday which is observed on a Monday, the payment date shall be the first non-Holiday day following such Sunday or Holiday. If such payment date falls on a Saturday or on a Holiday which is observed on Tuesday, Wednesday, Thursday or Friday, the payment date shall be the last non-Holiday day preceding such Saturday or Holiday.

(2) In the event of a billing dispute, the customer must submit a documented claim for the disputed amount. If the claim is received within 6 months of the payment due date, (i.e. bill date plus 31 days) and the customer has paid the total billed amount, any interest credits due the customer upon resolution of the dispute shall be calculated from the date of overpayment. If the claim for the disputed amount is received more than 6 months from the payment due date, any interest credits due the customer upon resolution of the dispute shall be calculated from the later for the date the claim was received or the date of overpayment. A credit will be granted to the customer for both the disputed amount paid and an amount equal to the percentage rate as set for in 2.4.1(D)(1) one Company will assess or credit late payment charges on disputed amounts to the customer as follows:

If the dispute is resolve in favor of the Telephone Company and the customer has paid the disputed amount on or before the payment due date, no late payment charges will apply.

If the dispute is resolved in favor of the Telephone Company and the customer has withheld the disputed amount, any payments withheld pending settlement of the dispute shall

be subject to the late payment charge as set forth in 2.4.1(D)(1).

Issued: March 8, 2002
Effective: April 8, 2002

Issued By: D. M. Anderson
Vice President-
External Affairs

IOWA No. 2
FACILITIES FOR INTRASTATE ACCESS
Iowa Telecommunications Services, Inc.
d/b/a Iowa Telecom **Original Sheet 36**
Telephone Tariff
Filed with Board

2. GENERAL REGULATIONS (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Charges and Deposits (Cont'd)

(D) (Cont'd)

(2) (Cont'd)

If the dispute is resolved in favor of the customer and the customer has withheld the disputed amount, the customer shall be credited for each month or portion thereof that the late payment charge as set forth in 2.4.1(D)(1) may have been applied. In the event the customer has paid the late payment charge, a credit will be granted to the customer for both the late payment charge paid on disputed amount and an amount equal to the percentage rate as set forth in 2.4.1(D)(1).

2.4.2 Minimum Periods

(A) The minimum periods for which FIA are provided and for which rates and

charges are applicable are set forth in 3.2.4 following.

(B) The minimum periods for which FIA are provided and for which rates and charges are applicable for Specialized FIA or Arrangements provided on an Individual Case Basis, as set forth in Section 7 following are established with the individual case filing.

(C) For discontinuances of FIA with a one month minimum period, all applicable charges for the one month period will apply. In instances where the minimum period is greater than one month, however, the charge will be the lesser of the Telephone Company's non-recoverable costs less the net salvage value for the discontinued service of the minimum period charges.

2.4.3 Cancellation of an ASR

Provisions for the cancellation of an ASR are set forth in 3.2.6 following for an ASR.

APPENDIX E

RELEVANT PORTIONS OF THE UNITED STATES CODE

47 U.S.C.A. § 152

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title

and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C.A. § 153

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

***

(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

***

(53) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 C.F.R. § 64.702

§ 64.702 Furnishing of enhanced services and customer-premises equipment.

(a) For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

OPPOSITION BRIEF

No. 12-815

In The
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,

Petitioner,

v.

ELIZABETH S. JACOBS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 6, 2013

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Eighth Circuit properly concluded, based on the specific facts of this case, that *Younger* abstention is warranted where there is an ongoing state proceeding that implicates the important state interest of regulating intrastate utilities and that allows the federal plaintiff to litigate the federal claims that were included in both its federal and state actions.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	8
I. Further Review by this Court Would be Premature	8
II. Petitioner Overstates the Existence of and the Urgency to Resolve a Circuit Split	9
III. This Case Involves a Straightforward Application of *Younger* Abstention Principles and Was Correctly Decided by the Eighth Circuit	11
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990) 16

Arkansas Power & Light Co v. Missouri Pub. Serv. Comm'n, 829 F.2d 1444 (8th Cir. 1987) 16

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 13

Cedar Rapids Cellular Telephone, L.P. v. Miller, 280 F.3d 874 (8th Cir. 2002) 12

Donohue v. Mangano, 886 F. Supp. 2d 126 (E.D.N.Y. 2012) 10

Ebiza, Inc. v. City of Davenport, 434 F. Supp. 2d 710 (S.D. Iowa 2006) 13

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 12

Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 437 U.S. 423 (1982) 1, 11, 14, 15

Minnesota Public Utilities Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007) 6

National Parks Conservation Association v. Lower Providence Township, Pennsylvania, 608 F. Supp. 2d 637 (E.D. Pa. 2009) 10, 11

New Orleans Pub. Serv., Inc. v. City of New Orleans, 491 U.S. 350 (1989) ..... *passim*

Night Clubs v. City of Fort Smith, Arkansas, 163 F.3d 475 (8th Cir. 1998) 13

Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986) 9

TABLE OF AUTHORITIES – Continued

Page

OCMC v. Norris, et al., 428 F. Supp. 2d 930 (S.D. Iowa 2006) 12

Trainor v. Hernandez, 431 U.S. 434 (1977) 13

Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*

STATUTES AND OTHER LEGISLATIVE AUTHORITIES

42 U.S.C. § 1983 9

47 U.S.C. § 152(b) 3, 14, 16

47 U.S.C. § 252(b) 12

Iowa Code § 17A.19 7

Iowa Code chapter 476 3

Iowa Code § 476.1 3

Iowa Code § 476.3 3

Iowa Code § 476.4 3

Iowa Code § 476.5 3

Iowa Code § 476.11 3

Iowa Code § 476.20 3

199 Iowa Administrative Code 22.14(1) "a" 15

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663 (Rel. Nov. 18, 2011), appeal docketed, In re: FCC-11-161, No. 11-9900 (10th Cir. filed Dec. 8, 2011) 6

Federal Communications Commission, *Connecting America: The National Broadband Plan* (released March 16, 2010) 5

Petition of UTEX Commun's Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, DA 09-2205, 24 FCC Rcd. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 FCC Rcd. 14168 (Wir. Comp. Bur. 2010) 5

TABLE OF AUTHORITIES -- Continued

Page

Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket 03-211, 19 FCC Rcd. 22404, rel. Nov. 12, 2004 6

INTRODUCTION

The petition for writ of certiorari should be denied. There is no compelling reason to review the Eighth Circuit's decision in a case involving a straightforward application of the principles of abstention under *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger*"). Further review of the Eighth Circuit's decision would be unwarranted for at least three reasons. First, Petitioner's federal complaint has been stayed, not dismissed. Petitioner is not precluded from returning to federal court upon completion of the state proceeding presently underway, if appropriate at that time. Second, to the extent there is a split in the circuits regarding the coercive-remedial distinction for abstention purposes, the degree of that split is not yet clear. Nor is it clear that such a split, if it has developed with sufficient clarity, is an important matter worthy of this Court's review. And third, the decision below is correct.

The Eighth Circuit's decision is true to the principles of *Younger* as they have evolved in cases decided by this Court. Following the principles of comity and federalism discussed in *Younger* and the test developed by this Court in *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 437 U.S. 423 (1982), the Eighth Circuit properly found that abstention was warranted to avoid interfering with an ongoing state proceeding that implicates the state's important interest of regulating intrastate utility services in the public interest. The state proceeding in this case involves more than a private interest.

The Eighth Circuit gave appropriate consideration to whether the state proceeding could be labeled as "coercive" or "remedial." The Eighth Circuit did not reject use of the coercive-remedial distinction or decide whether the state proceeding in this case is in fact coercive or remedial, stating only that the distinction is not "outcome determinative." Pet. App. 7a. Instead, the Eighth Circuit focused on the sufficiency of the state's interest, concluding that "Iowa has an important state interest in regulating and enforcing its intrastate utility rates." Pet. App. 8a. The Eighth Circuit's analysis of the state interest is consistent with abstention cases decided by this Court. This Court has not elevated consideration of whether a state proceeding can be labeled as coercive or remedial to the status of a determinative factor. Where the Eighth Circuit's decision is consistent with *Younger*, review by this Court is not necessary.

COUNTER-STATEMENT OF THE CASE

The Iowa Utilities Board ("Board") offers this statement to clarify and correct certain statements in the Petition regarding the dispute between Sprint and Iowa Telecom, the Board's administrative proceeding, the state of the law at the time the Board considered the dispute, and the posture of the case. This Petition arises from a dispute between Sprint and Iowa Telecom, two companies providing telecommunications service in Iowa subject to the regulatory authority of the Board pursuant to state law.

Iowa Code chapter 476. Congress has explicitly reserved authority to the states to govern intrastate telecommunications service. 47 U.S.C. § 152(b).

As the state agency charged with regulating intrastate telecommunications service in Iowa, the Board has broad general authority to give effect to the purposes of Iowa Code chapter 476, which authorizes the Board to regulate public utilities (Iowa Code § 476.1); to resolve complaints filed by anyone or brought on the Board's own motion to determine the reasonableness of anything done by a public utility (§ 476.3); to require and enforce tariffs governing the provision of intrastate service (§§ 476.4 and 476.5); and to oversee disconnection of utility service. (§ 476.20). The Board is authorized to resolve disputes between telecommunications companies, including disputes over unpaid intrastate access charges, in order to protect the public interest in a fully-interconnected telecommunications network. (§ 476.11).

This dispute arose after Sprint stopped paying intrastate access charges to Iowa Telecom for calls made using a type of Voice over Internet Protocol (VoIP) technology after having paid the charges for years without dispute. The charges were required by Iowa Telecom's intrastate access tariff that had been filed with and approved by the Board pursuant to state law. (§ 476.5). Sprint decided to stop paying intrastate access charges on VoIP traffic without any prior approval by the Board or decision by the Federal Communications Commission (FCC) that would have permitted the cessation of payment. Sprint's

refusal to pay the tariffed charges prompted Iowa Telecom to threaten to discontinue providing services to Sprint, disrupting the ability of certain end-user customers to make or receive calls.

Sprint filed a complaint with the Board over Iowa Telecom's threatened discontinuance of service. Sprint describes its dispute with Iowa Telecom over unpaid intrastate access charges as a "garden-variety commercial" dispute, as if the Board had no interest in doing anything other than ordering Iowa Telecom not to discontinue service to Sprint. Pet. 19. However, the Board recognized and Sprint acknowledged that the dispute was likely to recur, prompting new threats to the public interest in completing consumers' telephone calls. Pet. App. 66a. Thus, the dispute implicated the Board's interests in enforcing the terms of approved tariffs for intrastate telecommunications service and in protecting consumers who would be affected by any disruption in service resulting from discontinuance of service due to this "commercial dispute."

In response to the complaint, Iowa Telecom filed an answer with the Board saying Iowa Telecom would not discontinue service to Sprint so long as Sprint remained current on newly-billed charges. In response, Sprint filed a motion to withdraw its complaint, saying the only relief Sprint sought (a Board order prohibiting Iowa Telecom from discontinuing service) was no longer necessary. The Board granted Sprint's motion to withdraw its complaint but did

not close the docket; instead, the Board recast the proceeding to consider the question of whether Sprint properly withheld payment of access charges for intrastate VoIP calls. Pet. App. 65a-68a.

Sprint argued below that the VoIP calls were not subject to access charges because they are exempt from state regulation as an "information service." Pet. App. 88a-93a. In the Petition, Sprint refers to "general guidelines" from the FCC addressing the question of what constitutes an "information service." Pet. 8. Sprint says it decided the VoIP calls were not subject to access charges because the FCC had not imposed access charges on such calls. Pet. 8-10. However, at the time Sprint disputed the application of access charges to VoIP traffic, it was clear that the FCC had not classified VoIP as an information service[1] and that the FCC expected state regulatory commissions to make decisions regarding disputes over intercarrier compensation for intrastate VoIP traffic.[2] Pet. App. 97a, 109a, 117a-118a.

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[1] In its order issued on February 4, 2011, the Board referred to the Federal Communications Commission's National Broadband Plan that had been released March 16, 2010, observing that "In the National Broadband Plan, the FCC recognizes that it has not completed its work on VoIP compensation, stating . . . that it should address the treatment of VoIP for purposes of intercarrier compensation." *See* Pet. App. 107a, citing Federal Communications Commission, *Connecting America: The National Broadband Plan* (released March 16, 2010).

[2] *Petition of UTEX Commun's Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of*

(Continued on following page)

The Board concluded that the FCC had not classified VoIP as an information service and that the decisions addressing the regulatory status of VoIP did not constrain the Board's consideration of the dispute.[3] The Board issued an order (which applies exclusively to intrastate traffic) concluding that Iowa Telecom's access tariff applied to the VoIP calls and requiring Sprint to pay unpaid amounts. Pet. App. 60a. Subsequent FCC orders make it clear the Board's conclusions were correct. Any alterations of the division of regulatory responsibilities between the federal and state governments the FCC made in 2011 with respect to VoIP traffic (and other matters) had not been made at the time the Board reached its decision and those alterations are prospective only.[4]

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the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, DA 09-2205, 24 FCC Rcd. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 FCC Rcd. 14168 (Wir. Comp. Bur. 2010).

The Board recognized that where the FCC or a court has determined that a VoIP service was not subject to state regulation, the case involved "nomadic" VoIP, where the geographical endpoints of a call cannot be determined. *See* Pet. App. 110a-111a, citing *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) and *In re Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, 199 FCC Rcd. 22404, rel. Nov. 12, 2004.

[4] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up;*

(Continued on following page)

Sprint filed a complaint in federal district court challenging the Board's order and seeking declaratory and injunctive relief. Sprint asked the court to declare that the Board's order is contrary to federal law and to enjoin the Board from enforcing the order. On the same day Sprint filed the federal complaint, it filed a petition for judicial review of the Board's order in Iowa district court, pursuant to state law. Iowa Code § 17A.19. Sprint raises the same federal claims in both the federal complaint and state petition. The sole issue for review in Sprint's federal case was identical to one of several in the state petition. Sprint sought a stay of the state court proceeding to allow the federal action to proceed; the state court proceeding was not stayed.

The Board filed a motion asking the federal district court to abstain pursuant to *Younger*; the court granted the motion and dismissed the federal complaint. Pet. App. 11a. The district court concluded that the requirements for *Younger* abstention were met: the requested federal relief would unduly interfere with the state proceeding; the ongoing state proceeding implicates important state interests, including Iowa's interest in regulating intrastate

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Universal Service Reform – Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663, ¶¶¶40, 935, 946 n.1906 (Rel. Nov. 18, 2011), *appeal docketed, In re: FCC-11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

utility services; and the state proceeding allows Sprint an adequate opportunity to raise its federal claims. Sprint appealed that decision to the Eighth Circuit Court of Appeals, which upheld the district court's decision to abstain but vacated the decision to dismiss the federal complaint, instructing the district court to enter a stay instead. Pet. App. 1a. The state judicial review proceeding continues; briefing is complete and an oral argument before the district court is scheduled for March 8, 2013.

REASONS FOR DENYING THE PETITION

I. Further Review by this Court Would be Premature.

Sprint asserts that the Eighth Circuit denied Sprint's right to federal court review of its federal law claims. Pet. 5. That assertion is not correct. The Eighth Circuit upheld the district court's decision to abstain in deference to the ongoing state proceeding but vacated the district court's dismissal of Sprint's federal complaint. Sprint has not been denied access to the federal court. The Eighth Circuit indicated that in this case there is a possibility that the parties will return to federal court. Pet. App. 9a. Further review by this Court would be premature where it is not at all clear what the outcome of the state proceeding will be and what, if any, federal issues may remain.

Further, as discussed below, this case would make a poor vehicle for this Court's consideration of

the question presented by Sprint's Petition because the Eighth Circuit did not make the conclusions Sprint attributes to it.

II. Petitioner Overstates the Existence of and the Urgency to Resolve a Circuit Split.

Sprint bases its petition on a distinction between coercive and remedial state proceedings, insisting that distinction should determine the outcome of a court's abstention analysis. The Eighth Circuit acknowledges the distinction but did not apply it in this case to determine whether *Younger* required abstention. The distinction that was discussed more fully in this case and applied by the Eighth Circuit to guide its analysis is the distinction between judicial and legislative proceedings. This Court has recognized the distinction between judicial and legislative state proceedings and made it a part of the *Younger* abstention analysis. *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350, 368 (1989) (*"NOPSI"*). In contrast, the coercive-remedial distinction has been mentioned by this Court only once, in a footnote included in a case where the federal claim at issue was brought under 42 U.S.C. § 1983. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 627 n.2 (1986).

It is not yet clear whether the Eighth Circuit's statement that the coercive-remedial distinction is not outcome determinative places it on one side or the

other of a split that needs this Court's attention. Nor is it clear, as Sprint contends, that the outcome of this case would have been different if decided by a court in another circuit. (Sprint assumes, but cannot prove, that courts in other circuits would conclude that the state proceeding here is not coercive.) Contrary to Sprint's assertion that a majority of circuits are either "clearly" or "apparently" applying the coercive-remedial distinction as a determinative factor in abstention cases (Pet. 16 nn.8, 9), the circuits are not uniformly applying the distinction in their abstention decisions. *Donohue v. Mangano*, 886 F. Supp. 2d 126, 145 (E.D.N.Y. 2012).

For example, a district court in the Third Circuit (a circuit which Sprint contends has "apparently" adopted the coercive-remedial distinction as controlling) noted that *Younger* abstention "is only appropriate if the underlying state proceeding is judicial in nature and not merely legislative." *National Parks Conservation Association v. Lower Providence Township, Pennsylvania*, 608 F. Supp. 2d 637, 647 (E.D. Pa. 2009), citing *NOPSI*, 491 U.S. at 368. The district court in *National Parks* discussed the coercive-remedial distinction, observing that

> [u]nfortunately, in deciding whether or not to abstain under *Younger*, some courts have undermined the clear directive of the Supreme Court by introducing a theory of definitive resolution – a "remedial/coercive" analysis of the state court action. To do so prevents a court from conducting an analysis

> of the three *Younger* abstention factors articulated by the Supreme Court.

Id. at 652. The court also discussed the malleability of the distinction and how its use in the Third Circuit has resulted in inconsistent decisions. *Id.* at 654.

Further consideration by the lower courts of the meaning and utility of the coercive-remedial labels is necessary before it can be determined whether and to what extent the Eighth Circuit may be out of line with other circuits. Further review is not necessary at this time in this case given the fact that Sprint's federal action has been stayed, not dismissed. Sprint alleges, but fails to demonstrate, how it has been harmed or how the Eighth Circuit's decision will allow further "mischief" or contribute to confusion.

III. This Case Involves a Straightforward Application of *Younger* Abstention Principles and Was Correctly Decided by the Eighth Circuit.

The Eighth Circuit's decision to affirm the district court's decision to abstain is fully supported by and consistent with *Younger* and subsequent abstention cases decided by this Court. The Eighth Circuit did not expand the application of the *Younger* abstention doctrine but rather applied the doctrine as was intended by this Court – to promote interests of comity and federalism, thereby affording the "proper respect for state functions." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S.

at 431 (1982). The *Younger* abstention doctrine has evolved from one that originally applied only to prevent federal court interference with state criminal proceedings to one that applies in the context of state administrative proceedings. *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002), citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *OCMC v. Norris, et al.*, 428 F. Supp. 2d 930 (S.D. Iowa 2006). This Court recognizes that because the federal courts have "discretion in determining whether to grant certain types of relief . there are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.'" *NOPSI*, 491 U.S. at 359, citing *Younger*, 401 U.S. at 45.[6]

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[6] Sprint claims that counsel for the Board advocated for application of *Younger* to every Board proceeding and is likely to assert that position now. Pet. 13. The Board did not take that position in its brief submitted to the Eighth Circuit and does not take that position now. In its brief below, the Board acknowledged Sprint's assertion that federal courts routinely hear appeals challenging decisions of state public utility commissions in the telecommunications context, but observed that those appeals often are made to federal court pursuant to an explicit statutory requirement. 47 U.S.C. § 252(b). The Board argued only that it did not follow from Sprint's assertion about the frequency of federal review in the telecommunications context that every appeal of a Board decision must go to federal court. This case involved an important state interest in enforcing the terms of a Board-approved tariff. The Board's decision applied only to intrastate service. This case presented an important state interest that warranted abstention under *Younger*. Others may

(Continued on following page)

Sprint argues the Eighth Circuit has conflated the abstention doctrine under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("*Burford*"), with the *Younger* abstention doctrine, claiming the Board was trying to avoid invoking *Burford* in order to evade this Court's decision in *NOPSI*. Pet. 33-35. This argument draws distinctions that are not as strong as Sprint infers. First, the various abstention doctrines formulated by this Court are not "'rigid pigeonholes into which federal courts must try to fit cases.'" *Night Clubs v. City of Fort Smith, Arkansas*, 163 F.3d 475, 479 (8th Cir. 1998), quoting *NOPSI*, 491 U.S. at 359. Second, Sprint characterizes *NOPSI* too broadly. *NOPSI* did not involve a state-law claim. *NOPSI*, 491 U.S. at 361. The case involved a Federal Energy Regulatory Commission order that directed state regulators to allocate the costs of a specific set of nuclear power plants in a particular manner and therefore was subject to a claim that any contrary state action was "facially preempted," reflecting a strong federal interest in the matter. *NOPSI*, 491 U.S. at 363. In contrast, the case before the Board was about whether Sprint violated state law by not paying intrastate access charges, and there was no FCC order that facially preempted the Board's authority with respect

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not. Further, the Board recognizes that while this Court has expanded the application of *Younger* to state administrative proceedings, it "has stopped short . . . of stating that *Younger* applies in every civil case." *Ebiza, Inc. v. City of Davenport*, 434 F. Supp. 2d 710, 719 (S.D. Iowa 2006), citing *Trainor v. Hernandez*, 431 U.S. 434, 444 n.8 (1977).

to intrastate utility services, expressly reserved to the states pursuant to 47 U.S.C. § 152(b). Pet. App. 159a-160a. Further, the Board's action was adjudicatory, not legislative (as in *NOPSI*). Thus, there was no attempt to avoid *NOPSI*.

The Eighth Circuit properly observed that whether *Younger* abstention is appropriate is determined by the factors outlined in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Under those factors, *Younger* directs federal courts to abstain when (1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and when (3) that proceeding affords an adequate opportunity to raise the federal questions presented. Pet. App. 5a.

Sprint identifies the question presented in its Petition as whether the Eighth Circuit "erred by concluding . . . that *Younger* abstention is warranted not only when there is a related state proceeding that is 'coercive' but also when there is a related state proceeding that is, instead, 'remedial.'" Pet. i. That question is predicated on the assumption that the Eighth Circuit actually decided that the state proceeding in this case was remedial, not coercive. That assumption is not supported by the Eighth Circuit's opinion. Sprint complains of a ruling that was not made.

The Eighth Circuit acknowledged Sprint's contention that the state proceedings here are remedial, not coercive, but the court did not state whether it

agreed with Sprint's characterization. Instead, the Eighth Circuit simply noted that it "recognized the existence of the coercive-remedial distinction" but "we have not considered the distinction to be outcome determinative." Pet. App. 6a-7a. Sprint argued that because it filed the initial complaint with the Board, the proceeding was remedial. The Board contended that the state proceedings were coercive, rather than remedial, because while it is true that Sprint filed the initial complaint with the Board, Sprint then withdrew its complaint. However, the Board did not close the docket; instead, on its own motion, the Board recast the proceeding to determine whether Sprint improperly withheld payment of the disputed charges, i.e., committed misconduct, making this a coercive proceeding to enforce Iowa's laws regarding public utility regulation.[6] On these facts, the remedial nature of the state proceeding here was not apparent and the Eighth Circuit wisely concluded it was unnecessary to determine whether the state proceeding could be labeled as coercive or remedial, focusing instead on the second *Middlesex* factor.

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[6] In the recast proceeding, the Board sought to enforce, among other provisions of state law, the Board's administrative rule at 199 Iowa Administrative Code 22.14(1) "a," which provides that intrastate access charges apply to all intrastate access services rendered to interexchange utilities and contemplates that utilities such as Sprint must pay access charges to local exchange utilities such as Iowa Telecom for the origination and termination of intrastate toll traffic. Pet. App. 71a.

The Eighth Circuit also addressed Sprint's related argument that the state proceedings at issue do not involve an important state interest because, according to Sprint's overly-broad assertion, the telecommunications context presents a pervasive federal regulatory scheme. On this issue, the Eighth Circuit did not state that this case involves a pervasive federal regulatory scheme. The court acknowledged its prior statements in *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990),[7] but immediately countered that reference with a discussion of *NOPSI*, in which this Court recognized that states have "a substantial, legitimate interest in regulating

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[7] In *Alleghany v. McCartney*, 896 F.2d at 1145 (*cites omitted*), the Eighth Circuit discussed cases in the public utility context where a strong federal interest was present, but rejected a party's argument that those decisions supported the assertion that a federal preemption claim precludes *Younger* preemption. The court observed that the cases "involved a pervasive federal regulatory scheme which indicated a strong federal interest," which distinguished them from the insurance case before the court, "an area of regulation delegated to the states by Congress." *Id.* As an example of the type of strong federal interest recognized by the Eighth Circuit in *Alleghany v. McCartney*, *see Arkansas Power & Light Co v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987), where the court upheld the district court's decision not to abstain given the strong federal interest in regulation of wholesale electric rates, where "Congress has established a federal agency to resolve competing local interests, and not just one state, but several, all with interests adverse to each other, are involved." *Id.* at 1450. In contrast, in this case, where regulation of intrastate telecommunications is expressly reserved to the states by federal law, the state's interest is not overwhelmed by the federal interest. 47 U.S.C. § 152(b).

intrastate retail rates, one of the most important of the functions traditionally associated with the police power of the states." Pet. App. 7a, quoting *NOPSI*, 491 U.S. at 365. Finally, the Eighth Circuit recognized that Sprint's argument "impermissibly narrows the focus to the outcome of the case, rather than the importance of the generic proceedings to the state." Pet. App. 8a. The conclusion that Sprint attributes to the Eighth Circuit – that "it makes no difference that this case involves a 'pervasive regulatory scheme'" – is not found in the court's decision. Pet. 14.

Thus, instead of deciding whether *Younger* abstention was warranted based on whether the state proceeding could be labeled as coercive or remedial, the Eighth Circuit focused on the distinction that has been recognized by this Court as having a role in the *Younger* abstention analysis, i.e., whether a proceeding is judicial as opposed to legislative, observing that this Court noted in *NOPSI* that "only judicial proceedings are entitled to *Younger* abstention." Pet. App. 8a, citing *NOPSI*, 491 U.S. at 367. Agreeing with the district court, the Eighth Circuit concluded that the state proceeding was judicial because the Board "is seeking to enforce the status quo that existed before Sprint ceased paying the intrastate access charges. The Board's order attempts to enforce liabilities based on present facts and existing laws, and thus it constitutes a judicial proceeding that is entitled to *Younger* abstention." Pet. App. 9a. Because the Eighth Circuit correctly applied the requirements

for *Younger* abstention, no further review of the decision is necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 6, 2013

REPLY BRIEF

No. 12-815

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.
Petitioner

v.

ELIZABETH S. JACOBS, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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MARCH 19, 2013

TABLE OF CONTENTS

Page

I. There is Nothing "Premature" About Review of this Case by the Court. 4

II. This Case Exacerbates a Deep Split in the Circuits Warranting this Court's Review. 5

III. The Eighth Circuit's Approach is Wrong, and Cannot be Reconciled with Multiple Lines of this Court's Precedents. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Brown ex. rel. Brown v. Day, 555 F.3d 882 (10th Cir. 2009) 9

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 3

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 3, 10, 13

Donohue v. Mangano, 886 F. Supp. 2d 126 (E.D.N.Y. 2012) ..... 2, 6-7 & n.1

England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) 3, 10

Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops, Inc., 48 F.3d 294 (8th Cir. 1995) 10

Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011) 9

Nat'l Parks Conservation Ass'n v. Lower Providence T'ship, Pennsylvania, 608 F. Supp. 2d 637 (E.D. Pa. 2009) 2, 7-8

New Orleans Pub. Serv. Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) 3-4, 12

Night Clubs v. City of Fort Smith, Arkansas, 163 F.3d 475 (8th Cir. 1998) 12

Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) 11-12

Patsy v. Bd. of Regents of the State of Florida, 457 U.S. 496 (1982) 11

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002) 3, 10

Younger v. Harris, 401 U.S. 37 (1971) 1

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REPLY BRIEF FOR THE PETITIONER

The central argument that Sprint presented in its petition is that this case exacerbates a stark split in the circuits regarding whether a state administrative action must be "coercive" (as opposed to "remedial") for *Younger* abstention to apply. *See Younger v. Harris*, 401 U.S. 37 (1971). The Iowa Utilities Board's ("IUB's") opposition not only confirms the existence of that split, but underscores that it is fundamental, far-reaching, and deeply perplexing to the lower courts.

To begin, however, it is worth emphasizing what the IUB's brief does *not* do. It does not deny the

existence of the split, nor does it attempt to reconcile the circuit cases cited by Sprint so as to minimize the split. To the contrary, the IUB's opposition fails even to mention *any* of the dozen or so circuit court cases that Sprint advanced to illustrate the split.

Instead of addressing the relevant circuit court precedents, the IUB's legal arguments consist almost entirely of discussions of two district court decisions that strongly *support* Sprint's arguments for review. The first case, *Donohue v. Mangano*, 886 F. Supp. 2d 126, 145-46 (E.D.N.Y. 2012), confirms that at least eight circuits appear to incorporate the coercive/remedial distinction into their tests for *Younger* abstention—but also notes that "not *every* Circuit is in line with this thinking," citing the lone example of the Eighth Circuit on the other side of the split. *Id.* at 147 (emphasis added). The second case, *National Parks Conservation Ass'n v. Lower Providence Township, Pennsylvania*, 608 F. Supp. 2d 637 (E.D. Pa. 2009), also highlights the need for review. There, a district court in the Eastern District of Pennsylvania criticized its *own* court of appeals, the Third Circuit, for adopting the coercive/remedial distinction. *National Parks* argued that a different line—whether state administrative proceedings are "judicial" or "legislative" in nature—would be preferable. *Id.* at 654. Plainly, however, the fact that the law in this area is so confused that there are not two but three or more competing standards—and that district courts feel free to criticize controlling circuit precedent as "blurry" and "malleab[le]"—is an argument *for* certiorari, not against.

Sprint's petition also argued that the Eighth Circuit's application of *Younger* abstention is

fundamentally inconsistent both with this Court's precedents establishing the "primacy of the federal judiciary in deciding questions of federal law," *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-16 (1964), and with this Court's nuanced abstention jurisprudence. Once again, the IUB's opposition fails seriously to contest these points. The IUB does not even mention *England* or this Court's cases imposing on district courts the "virtually unflagging obligation" to decide cases within their jurisdiction, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nor does the IUB acknowledge that this Court has—consistent with *England* and *Colorado River*—specifically permitted federal courts to review the decisions of state telecommunications regulators. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 639 (2002); *see also* Pet. 23-26.

The IUB also provides no cogent response to Sprint's argument that the Eighth Circuit's approach collapses and conflates *Younger* and *Burford* abstention into a single, unrecognizably broad rule. In this appeal, Sprint has consistently argued that removing the requirement of *coercive* state administrative action from the *Younger* analysis leaves essentially *all* appeals of state agency proceedings to the federal courts subject to abstention. But that position cannot be squared with this Court's decisions. It is supposed to be *Burford* abstention—originating in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)—rather than *Younger* abstention that prevents federal court "intr[sion] into state proceedings where there exists a complex state regulatory system." *New Orleans Pub. Serv.*

Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) ("*NOPSI*"). The IUB failed even to invoke *Burford* below because, under *NOPSI*, abstention plainly is not warranted. Pet. 33-35. This Court should not permit *Burford* and *Younger* to be conflated into a broad rule providing that all review of state agency proceedings—even on important questions of *federal* law, as here—must take place in the state courts.

I. There is Nothing "Premature" About Review of this Case by the Court.

The IUB first suggests that this Court should deny certiorari on the ground that review could be mooted if Sprint *prevails* before the state court—*i.e.*, "it is not at all clear what the outcome of the state proceeding will be"—and that any "federal issues [that] remain" after the state case concludes could yet return to federal court. Opp. 8-9. But it is *always* the case that a plaintiff who is unlawfully denied a federal forum due to the misapplication of abstention law *could* prevail on the merits in state court. Sprint's point here is not about the merits at all—it is that the misapplication of abstention law below to deny Sprint the federal forum to which it is entitled exacerbated a split in the circuits that requires this Court's review. That split requires review now.

Moreover, as a practical matter, there is no chance of the state court proceeding actually mooting Sprint's petition. Although the state court failed to stay the state case pending resolution of the federal proceeding, the state case is ongoing and will be for some time. Oral argument in that case was recently scheduled for April 19, 2013, which is *after* the date of the conference for which Sprint's petition will be

distributed, and a written decision is thus presumably still months off. Order Continuing Hearing at 1, Sprint Comm. Co. v. Iowa Utils. Bd. (Iowa Dist. Ct. for Polk County No. CVCV0086368). Moreover, there can be no serious question that the state court *would* be amenable to a stay if this Court were to grant Sprint's petition.

II. This Case Exacerbates a Deep Split in the Circuits Warranting this Court's Review.

In its petition, Sprint argued that this Court should grant certiorari to resolve a deep split between the Eighth Circuit and the other circuits over the scope of *Younger* abstention. Pet. 15-23. More specifically, Sprint pointed out that *nine* circuits appear to apply *Younger* only if the ongoing state proceeding is "coercive"—*i.e.*, if it was initiated by the state to punish the federal plaintiff for wrongdoing. *Id.* at 16-17, nn. 8&9. Sprint further explained that this difference between the Eighth Circuit, which unquestionably does not view the coercive/remedial line as "outcome determinative," *see* Opp. 9, and other circuits, which do, is "unlikely to be resolved without the intervention of this Court." Pet. 20. The difference is rooted in longstanding and fundamentally different views of this Court's controlling precedents. Pet. 20-23.

As noted above, the IUB does not deny the existence of a split nor attempt to reconcile the cases cited by Sprint. Instead, it seeks to minimize the importance of the circuit split by arguing that the "circuits are not *uniformly* applying the [coercive/remedial] distinction [that Sprint invokes] in their abstention decisions." Opp. 10. This argument is fundamentally misguided; a lack of

uniformity among the circuits is a reason to *grant* review, not deny it.

The IUB does not cite or discuss *any* circuit court precedents to support its argument that the circuit split claimed by Sprint is "[o]verstate[d]." And the two *district* court decisions it advances only underscore the existence of a deep split and widespread uncertainty among the lower courts concerning the coercive/remedial distinction. If anything, these cases suggest that Sprint's characterization of the split in its petition was *understated*.

The first case, *Donohue v. Mangano*, 886 F. Supp. 2d 126 (E.D.N.Y. 2012), confirms that "many circuits" have "found the distinction [between coercive and remedial actions] to be a crucial one":

> [T]he Third Circuit and its district courts have consistently held that federal courts should abstain under *Younger* only when the state proceedings are "coercive", rather than "remedial." ... Precedent from the Seventh Circuit also appears to advise against application of *Younger* [absent coercive state action]. ... [And] [t]he Third and Seventh Circuits are not alone in adhering to this legal application. *See, e.g., Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir.2010); *Dukes v. Maryland*, No. 11 Civ. 876, 2011 WL 4500885, at *4 (D.Md. Sept. 27, 2011) ("The Fourth Circuit has twice reiterated that the distinction between remedial and coercive administrative proceedings is relevant to determining whether abstention is appropriate.") Most recently, the Tenth Circuit fully explored the

> remedial/coercive distinction and developed a structured approach for lower courts to incorporate the distinction into the traditional three-part *Younger* inquiry. ... Also, the First and Ninth Circuits expressly require a state-initiated action to show the existence of a coercive proceeding. ... The Second Circuit has not expressly ruled on this issue, but any inferences drawn from its opinions appear to indicate that the distinction is one that is valid.

Id. at 145-46 (internal citations and quotations omitted). In short, according to this case on which the *IUB* relies, at least *eight* circuits appear to apply precisely the distinction that Sprint says the Eighth Circuit should have applied here.[1]

The second district court case cited by the IUB is no more helpful to its cause. The IUB's goal appears to be to show that there are courts other than the Eighth Circuit—at least at the district court level—that question whether the coercive/remedial distinction that most circuits apply under *Younger* is a good one. Specifically, the *National Parks* court wrote:

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[1] Perhaps the IUB seeks solace in *Donohue*'s observation—citing two student Notes—that the coercive/remedial distinction "has been criticized." 886 F. Supp. 2d at 147. But if the IUB's point is that the coercive/remedial test adopted by numerous circuits is the *wrong* one, and the Eighth Circuit's standard is the *right* one, that is an argument better saved for this Court's review on the merits.

> The line between "coercive" and "remedial" cases is often blurry and has yet to be defined by the ... the Supreme Court. As previously stated, some courts have decided whether or not to abstain based only on the remedial/coercive distinction without considering the *Younger* abstention factors. If the issue is remedial, these courts have held that abstention is *per se* inappropriate. This has led to inconsistent decisions because of the malleability of the remedial/coercive distinction.

Nat'l Parks Conservation Ass'n v. Lower Providence T'ship, Pennsylvania, 608 F. Supp. 2d 637, 654 (E.D. Pa. 2009). *National Parks* thus appears to criticize its *own* circuit court for "adher[ing]" to the coercive/remedial distinction because it is purportedly "blurry" and "malleab[le]." But the suggestion that the rule is not only the subject of a circuit split but *also* a source of great uncertainty for the lower courts indicates that review is *more* necessary, not less.

The IUB further responds to Sprint's claim of a deep, abiding split by arguing that Sprint "cannot prove, that courts in other circuits would conclude that the state proceeding here is not coercive." Opp. 10. This argument is also misguided. First, the split here is not dependent on factbound analysis of whether particular proceedings are or are not "coercive." The split here arises because other circuits—unlike the Eighth Circuit—think it matters whether a proceeding is coercive or not. Indeed, the Eighth Circuit has squarely acknowledged that other circuits find this distinction "outcome determinative"

under *Younger*, see *Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011)—no coercive state action means no *Younger* abstention. In contrast, the Eighth Circuit in this case *reaffirmed* that it does not care whether a proceeding is "coercive" or not in deciding whether to apply *Younger*. Pet. App. 6a-7a. *That* is the heart of the split here, and the IUB does not even attempt to explain it away.

Second, even if it were to matter, we *do* know that "courts in other circuits would conclude that the state proceeding here is not coercive." Opp. 10. We know that because other circuits have described the category of proceedings that they would find "coercive," and this case does not fit. For example, the Tenth Circuit has explained that a "common thread" in coercive administrative proceedings is that "the federal plaintiff had engaged in misconduct," and the state administrative proceeding "would ultimately impose punishment for that misconduct." *Brown ex. rel. Brown v. Day*, 555 F.3d 882, 892 (10th Cir. 2009). But this case does not involve a state enforcement action to punish Sprint for bad acts. This case involves a garden-variety commercial dispute between Sprint and Windstream about how (if at all) the "intercarrier compensation" regime applies to certain "Voice over Internet Protocol" communications. Pet. 7-10. And—contrary to the IUB's claims, Opp. 15—*neither* the fact that the IUB proceeding went forward over Sprint's objection that the Board lacked authority to resolve the underlying issues of federal law, Pet. 10, *nor* the fact that the IUB ultimately ruled that Sprint owed Windstream intercarrier compensation, *id.*, transformed this commercial dispute into a state enforcement action.

III. The Eighth Circuit's Approach is Wrong, and Cannot be Reconciled with Multiple Lines of this Court's Precedents.

The fact that the Eighth Circuit is alone on its side of the circuit split here—with *most* of the other circuits arrayed against it—casts considerable doubt on its position. But there is a far more important reason to reject the Eighth Circuit's removal of the coercive requirement from *Younger* analysis. It simply cannot be reconciled with multiple lines of this Court's precedent.

First, the Eighth Circuit's rule that even run-of-the-mill, non-coercive state agency proceedings may trigger *Younger* abstention conflicts with this Court's precedents that district courts have a "virtually unflagging obligation" to decide cases brought before them, and "[t]his obligation does not evaporate simply because there is a pending state court action involving the same subject matter." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops, Inc.*, 48 F.3d 294, 297 (8th Cir. 1995) (citing *Colorado River*, 424 U.S. at 817). With few exceptions—including the specific, narrow carve-outs of the abstention doctrines—"a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims" in federal court." *See, e.g., England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 417 (1964). Accordingly, this Court has specifically allowed for federal courts to review the federal-law decisions of state telecommunications regulators. *See, e.g., Verizon Maryland*, 535 U.S. 635. The Eighth Circuit's decision is inconsistent with

these lines of cases—all of which the IUB fails even to mention.

Second, the decision below is inconsistent with the core principle underlying all of this Court's abstention cases, which is that *state* courts should be allowed to administer *state* statutory, regulatory, and enforcement regimes without undue interference from *federal* courts. Here, in contrast, Sprint's efforts to obtain review concern the *federal* courts' authority (and, indeed, responsibility) to decide *federal* law issues as to which *state* agencies have no authority whatsoever. The fundamental principle of non-interference in matters of the states' administration and enforcement of their own laws that underlies all of abstention law is inapposite here. *See* Pet. 27-30. And, again, the IUB makes no argument at all to the contrary.

Third, by ignoring the coercive/remedial distinction, the Eighth Circuit split not only with most other circuits, but also with this Court's own case announcing that distinction. Specifically, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), the Court found that *Younger does* apply to administrative action brought by a state agency to vindicate the State's policy against sex discrimination. The Court distinguished its earlier holding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), on the ground that "[u]nlike *Patsy*, the administrative proceedings here are *coercive rather than remedial*, began before any substantial advancement in the federal action took place, and involve an important state interest." 477 U.S. at 627

n.2 (emphasis added and citations omitted). The IUB's opposition fails to mention *Dayton* or *Patsy*.

Finally, the Eighth Circuit's decision thoroughly confuses abstention law by conflating the *Burford* and *Younger* doctrines into a new, unrecognizably broad kind of abstention.[2] *Burford* abstention cases require the federal courts to permit the states to administer their regulatory regimes without undue interference from the federal courts, *see NOPSI*, 491 U.S. at 361, while *Younger* prevents federal court interference with state criminal and similar civil-enforcement regimes. In its petition, Sprint argued that the Eighth Circuit's application of abstention in this case blurred the lines between *Burford* and *Younger* in a way that makes no sense. Pet. 33-35.

The IUB responds that "the various abstention doctrines formulated by this Court are not 'rigid pigeonholes into which federal courts must try to fit cases.'" Opp. 13 (citing *Night Clubs v. City of Fort Smith, Arkansas*, 163 F.3d 475, 479 (8th Cir. 1998)). But even if the abstention doctrines are not "rigid pigeonholes," this Court has emphasized that they are "sufficiently distinct to justify independent analyses" under different legal standards. *NOPSI*, 491 U.S. at 359-60. And they *are* exceptions to the

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[2] As Sprint explained in its Petition, in oral argument before the Eighth Circuit the IUB's counsel *agreed*. Pet. 13 & n.7. The IUB does not deny that fact, but instead cagily points out that it "did not take that position" in writing either in its brief below or its opposition. But the IUB's continued coyness (at least in writing) concerning the *reductio ad absurdum* nature of the standard it advanced (and the Eighth Circuit adopted) below does not make the standard any less broad.

general rule—which, again, the IUB fails even to acknowledge—that district courts have a "virtually unflagging obligation" to decide cases over which they have jurisdiction. *Colorado River*, 424 U.S. at 817. A broad rule that district courts must always (or nearly always) defer to state court proceedings reviewing state administrative decisions on issues of *federal* law is inconsistent with that obligation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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MARCH 19, 2013

JOINT APPENDIX

Supreme Court, U.S.
FILED
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No. 12-815

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,
v.
ELIZABETH S. JACOBS, et al.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 2, 2013
CERTIORARI GRANTED APRIL 15 2013

TABLE OF CONTENTS

Page

Complaint for Declaratory and Injunctive Relief (Filed April 25, 2011), *Sprint Communications Company, L.P., vs. Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board* 1a

Motion for Abstention and Request for Expedited Relief (Filed May 16, 2011), *Sprint Communications Company, L.P., vs. Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board* 11a

Brief in Support of Motion for Abstention (Filed May 16, 2011), *Sprint Communications Company, L.P., vs. Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board* 14a

Sprint's Opposition to the Defendants' Motion to Abstain (Filed June 3, 2011), *Sprint Communications Company, L.P., vs. Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacities as Members of the Iowa Utilities Board* 21a

Reply to Sprint's Opposition to Motion for Abstention (Filed June 10, 2011), *Sprint Communications Company, L.P., vs. Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board* 32a

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Sprint Communications
Company, L.P.,
Plaintiff

Case No.: 11-cv-183

vs.

Robert B. Berntsen,
Krista Tanner, and
Darrell Hanson, in their official
capacity as Members of the Iowa
Utilities Board,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Sprint Communications Company, L.P. ("Sprint") brings this action to challenge an order ("Order") by the Iowa Utilities Board ("IUB" or "Board") purporting to compel Sprint to pay fees known as intrastate access charges to Iowa Telecommunications Services, Inc. ("Iowa Telecom," now known as Windstream Iowa Communications, Inc., or "Windstream"). Sprint seeks declaratory and injunctive relief against the Members of the IUB, acting in their official capacities, not as individuals. The challenged Order is attached as Exhibit A, and the IUB's order denying reconsideration of that Order is attached as Exhibit B.

2. The Order is contrary to federal law, which gives the Federal Communications Commission — and not the state utilities boards — the authority to determine whether intrastate access charges apply to the traffic at issue in this case. Accordingly, Sprint asks this Court to declare that the Order is contrary to federal law and to enjoin the Defendants from enforcing it.

PARTIES

3. Sprint Communications Company, L.P., is a limited partnership organized and existing under Delaware law with a principal place of business in Overland Park, Kansas.

4. Robert B. Berntsen is the chairman of the Iowa Utilities Board and performs his official duties primarily in Des Moines, Iowa. Mr. Berntsen is sued in his official capacity for injunctive and declaratory relief only.

5. Krista Tanner is a member of the Iowa Utilities Board and performs her official duties primarily in Des Moines, Iowa. Ms. Tanner is sued in her official capacity for injunctive and declaratory relief only.

6. Darrell Hanson is a member of the Iowa Utilities Board and performs his official duties primarily in Des Moines, Iowa. Mr. Hanson is sued in his official capacity for injunctive and declaratory relief only.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202, as interpreted by *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). Plaintiff's claims arise under the Constitution and the laws of the United States, including the Supremacy Clause (art. VI, cl. 2) and the Communications Act of 1934, 47 U.S.C. § 151, et. seq.

8. Alternatively, this Court has jurisdiction under 28 U.S.C. § 1332 because the parties are diverse and the Order at issue purports to compel Sprint to pay more than $75,000 in access charges.

9. This Court has authority to issue injunctive relief under the All Writs Act, 28 U.S.C. § 1651.

10. Venue is proper in this district under 28 U.S.C. § 1391(b) because all Defendants reside in this district and because a substantial portion of the events took place in this district.

11. Sprint has exhausted its administrative remedies by filing a petition for reconsideration, which was denied on March 25, 2011. The order denying Sprint's petition for reconsideration is attached as Exhibit B.

PROCEDURAL BACKGROUND

12. This case arises from a dispute between Sprint and Iowa Telecom (now Windstream) over

intercarrier compensation — the fees that telephone companies pay each other when the customer of one telephone company places a call to the customer of another telephone company. The calls at issue in this case are known as Voice over Internet Protocol ("VoIP") calls. VoIP calls differ from ordinary telephone traffic in that they are initially carried by Internet Protocol over a packet-switched network, whereas ordinary telephone traffic is carried by Time Division Multiplexing ("TDM") protocol over a circuit-switched network.

13. Sprint frequently routes VoIP calls to Windstream for delivery to Windstream's customers outside of the local exchange in which the calls originated. For connecting these calls to Windstream customers (or "terminating" the calls, to use the industry jargon), Windstream has billed Sprint for a type of intercarrier compensation known as "intrastate access charges."

14. Sprint initially paid these access charges but ultimately concluded that it was not required to pay intrastate access charges for VoIP traffic. As a result, it disputed the charges and withheld payments. In response, Windstream threatened to disconnect Sprint's service and effectively block calls to and from Sprint customers.

15. Sprint filed a complaint with the IUB asking the Board to declare that, under Windstream's tariff, Sprint was entitled to withhold payment of disputed charges and that Windstream could not block calls because of Sprint's refusal to pay disputed amounts.

16. Sprint did not ask the IUB to resolve the separate question whether VoIP calls are subject to intrastate access charges. That determination, Sprint explained, can be made only by the Federal Communications Commission, and the IUB lacks jurisdiction to resolve the issue.

17. In response to Sprint's complaint before the IUB, Windstream informed Sprint and the IUB that it would not attempt to discontinue Sprint's service or block the calls of Sprint's customers. Thus, Sprint sought to withdraw its complaint.

18. The IUB allowed Sprint to withdraw its complaint but nevertheless decided to "recast the proceeding to consider Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue."[1]

19. Although Sprint repeatedly argued that the IUB lacks jurisdiction to make such a determination, the Commission ultimately ruled that Sprint must pay access charges for VoIP traffic that it sends to Windstream for termination. Sprint moved for reconsideration, but the IUB denied Sprint's motion, reiterating its position that VoIP traffic is subject to intrastate access charges.

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[1] *Sprint Commc'ns Co. v. Iowa Telecommc'ns Servs.*, Order Granting Motion to Withdraw, Denying Motion for Clarification, Canceling Hearing, and Revising Procedural Schedule, IUB Docket No. FCU-2010-0001, 2010 WL 421105 at 7 (Feb 1, 2010).

COUNT I

(Preemption of State Regulation of Information Services.)

20. Sprint incorporates by reference the preceding paragraphs.

21. The IUB's determination that Sprint must pay intrastate access charges for VoIP traffic conflicts with federal law because, as explained below, VoIP is an information service, and federal law preempts state regulation of information services.

22. The Communications Act, as modified by the Telecommunications Act of 1996, distinguishes between two types of communications: telecommunications services and information services. The former are subject to joint common-carrier regulation by the federal government and the states, while the latter are largely deregulated and are subject only to federal law.

23. The FCC has held that a service is an "information service" under the Act if it "enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol."[2] This process is known as a "net protocol conversion."

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[2] *Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Communications Act of 1934, As Amended.*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21956 ¶ 104 (1996).

24. Following this logic, the FCC has classified as information services "those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks (collectively 'IP/PSTN' services)."[3]

25. The VoIP traffic at issue in this case originates in Internet Protocol but is converted to Time Division Multiplexing ("TDM") protocol when it is connected to the Public Switched Telephone Network ("PSTN"), which is a circuit-switched network. The traffic thus undergoes a net protocol conversion and is an "information service" under the Act.

26. The Communications Act preempts state utilities commissions from regulating information services. As numerous courts have recognized, Congress and the FCC have clearly set forth a deregulatory path for such services. Thus, for the most part, information services are exempt from common-carrier regulations imposed by the Communications Act. As one court explained, Congress's decision not to apply these regulations to information services "demonstrates its intent to occupy the field of regulation of information services."[4]

---

[3] *High-Cost Universal Serv. Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, 6589 ¶ 209 (2008).

[4] *See, e.g., Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1001-02 (D. Minn. 2003) (finding

27. Moreover, although the FCC has not ruled on whether VoIP traffic is an "information service," its treatment of VoIP traffic thus far is entirely consistent with the deregulatory path Congress has prescribed for information services. Indeed, in the *Vonage Preemption Order*, the Commission already preempted state regulation of some types of VoIP traffic, while strongly predicting that it would do the same with others. The Commission predicted that "to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."[5]

28. Accordingly, Sprint seeks a declaratory judgment that only the FCC — and not the IUB — has the authority to determine whether intrastate access charges apply to VoIP traffic. It further seeks a preliminary and a permanent injunction preventing the Defendants from enforcing the IUB's Order determining that Sprint must pay intrastate access charges for VoIP traffic.

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preemption of state regulation of VoIP services because they are information services); *see also Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006), *aff'd on other grounds*, 530 F.3d 676 (8th Cir. 2008).

[5] *Vonage Holdings Corp.*, Memo. Op. and Order, 19 FCC Rcd. 22404, 22424 ¶ 32 (2004) ("Vonage Preemption Order").

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter an order:

1. Declaring that the IUB's Order violates federal law and thus is invalid to the extent that it purports to determine whether Sprint has an obligation to pay intrastate access charges for VoIP traffic.

2. Entering preliminary and permanent injunctive relief enjoining all defendants from enforcing the IUB's Order to the extent contrary to federal or Iowa law.

3. Granting the Plaintiffs such other and further relief as the court may deem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Sprint Communications Company, L.P.,
Plaintiff

Civil No. 11-cv-183

v.

Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board,
Defendants.

MOTION FOR ABSTENTION AND REQUEST FOR EXPEDITED RELIEF

Defendants Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as members of the Iowa Utilities Board (Board Members), move this Court to abstain from hearing this action pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874 (8th Cir. 2004). In support of the motion, the Board attaches a supporting memorandum and states:

1. The complaint for declaratory and injunctive relief brought by Sprint Communications Company, L.P. (Sprint) alleges the Utilities Board

(Board) issued an order that is contrary to federal law.

2. Sprint seeks a ruling from this Court that only the Federal Communications Commission has the authority to determine whether intrastate access charge tariffs apply to certain telephone calls. Sprint also asks the Court to grant preliminary and permanent injunctive relief enjoining the Board Members from enforcing a Board order determining that Sprint must pay intrastate access charges on those calls to the local exchange carriers that originate and terminate the calls, as required by tariff filed with, and approved by, the Board.

3. The *Younger* abstention doctrine directs federal courts to abstain from hearing cases where there is an ongoing state judicial proceeding which implicates important state interests and when that proceeding affords an adequate opportunity to raise federal questions. All three elements are satisfied in this case. On April 25, 2011, Sprint filed a petition for judicial review of the Board's order in Iowa district court, identified as Sprint Communications Company, L.P., v. Iowa Utilities Board, Polk County District Court No. CVCV008638. That proceeding involves the State of Iowa's important interest in enforcing the terms and conditions of filed telephone company tariffs, as required by Iowa Code § 476.5. That proceeding also affords Sprint an adequate opportunity to raise the federal questions presented in its complaint, which Sprint has done.

4. The Board's enforcement of the laws and regulations applicable to intrastate telecommunications calls has not been preempted by

federal law. Sprint's preemption claim does not preclude this Court from abstaining in this case.

5. The Board Members request expedited relief on this motion to limit any delay or disruption to the ongoing proceedings in Polk County District Court.

WHEREFORE, the Board Members move the Court to abstain.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Sprint Communications Company, L.P.,
Plaintiff

Case No. 11-cv-183

v.

Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board,
Defendants.

BRIEF IN SUPPORT OF MOTION FOR ABSTENTION

STATEMENT OF THE CASE

Plaintiff Sprint Communications Company, L.P (Sprint), seeks a declaratory judgment that the Iowa Utilities Board (Board) lacks jurisdiction to determine whether an intrastate access services tariff filed with the Board by Windstream Iowa Communications, Inc., applies to certain interexchange telecommunications calls carried by Sprint in Iowa. More specifically, Sprint asserts that calls made between customers in Iowa using Voice over Internet Protocol, or VoIP, are "information services" that are subject only to federal law under

the federal Communications Act, even though Sprint admits that the Federal Communications Commission has not, in fact, ruled on whether VoIP traffic is an information service. (Complaint at para. 27.)

BACKGROUND

For purposes of this motion only, the Board Members accept the statement of procedural background and description of the proceedings before the agency as submitted to the Court in Sprint's complaint.

ARGUMENT

1. Abstention pursuant to *Younger v. Harris* is appropriate in this case.

The doctrine of abstention articulated in *Younger v. Harris*, 401 U.S. 37 (1971), requires this Court to abstain from hearing this case. *Younger* directs federal courts to abstain from hearing cases when (1) there is an ongoing state judicial proceeding which (2) implicates important state interests and when (3) that proceeding affords an adequate opportunity to raise the federal questions presented. *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002) (*Cedar Rapids*); *OCMC, Inc., v. Norris, et al.*, 428 F.Supp.2d 930, 933 (S.D.Iowa 2006).

Here, the Board orders and actions that are the subject of this proceeding are also the subject of judicial proceedings in state court, also brought by

Sprint, and initiated on the same day as this proceeding, identified as Sprint Communications Company, L.P., v. Iowa Utilities Board, Polk County District Court No. CVCV008638 (filed April 25, 2011). In that action, Sprint has raised the same federal preemption issue it presents to this Court; Paragraph 7(a) of the state court petition states:

> 7. Sprint seeks relief on the following grounds:
>
> (a) The IUB's Order is unconstitutional under the Supremacy Clause and beyond the Board's authority insofar as it purports to determine that Sprint must pay intrastate access charges for the termination of VoIP traffic, a question that federal law vests solely with the Federal Communications Commission ("FCC").

(State court petition at p. 2.) The proceedings before the state court will therefore allow Sprint an adequate opportunity to raise the federal questions it now presents. The state court is well equipped to investigate, analyze, and resolve constitutional issues in judicial review proceedings pursuant to Iowa Code § 17A.19. The injunctive and declaratory relief Sprint seeks would prematurely halt the ongoing state proceedings for no good reason.

The state's interest in enforcing the tariffs that apply to intrastate interexchange calls is important and expressed in statute; Iowa Code § 476.5 prohibits public utilities in Iowa from charging more or less that the rates prescribed in their tariffs,

in part so that no customer shall be subject to unreasonable prejudice or disadvantage or benefit from any unreasonable preference or advantage. The state has a long history of regulating public utilities to protect the public from unfair business practices. *Cedar Rapids*, 280 F.3d at 880.

The Eighth Circuit Court of Appeals recognizes the capacity of the state courts to decide federal questions and has specifically ruled that "the courts of Iowa are competent to rule on ... preemption claims." *Cedar Rapids*, *supra*, 280 F.3d at 881, citing *Fuller v. Ulland*, 76 F.3d 957 (8th Cir. 1996).

By abstaining from hearing this matter, as is indicated by application of the *Younger* factors explained above, the Court would be promoting the interests of comity between the state and federal systems. This is recognized as the "moving force" behind the abstention doctrine. *Cedar Rapids*, *supra*, 280 F.3d at 881. The *Cedar Rapids* court recalled that in *Younger*, the Supreme Court explained that the notion of comity reflects a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*, quoting *Younger*, 401 U.S. at 44.

2. Sprint's preemption claim does not prevent the Court from abstaining.

First, the Board Members dispute Sprint's assertion that the Board lacks jurisdiction to determine whether intrastate access service tariffs apply to telecommunications calls within Iowa. The FCC has not determined that VoIP calls are an "information service," so there is no preemption.

Second, the mere assertion of a preemption claim does not prevent the Court from abstaining in this matter, even if the claim is substantial. *Cedar Rapids, supra*, 280 F.3d at 880, citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364-67 (1989). Some courts have held that "facially conclusive" preemption presents the possibility of an exemption to *Younger*, see id., but there can be no realistic assertion of "facially conclusive" preemption when Sprint admits the FCC has not ruled on the question.

Further, as noted above, the Board's interest in enforcing the tariffs filed with the Board with respect to intrastate long distance calls is substantial, and that interest is not exclusively under federal control. Congress has not taken steps to preempt states from regulating intrastate communications; instead, 47 U.S.C. § 152(b) prohibits federal regulation of "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier...." This creates a system of dual state and

federal regulation over telephone service. *OCMC*, 428 F.Supp.2d at 936, citing *Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986).

Sprint fails to show that Congress or the FCC has taken explicit steps to limit the authority of states to regulate intrastate calls made using VoIP technology. Sprint fails to present a preemption claim that is facially conclusive, if such a showing would even be sufficient to prevent this Court from abstaining.

CONCLUSION

The Board urges the Court to abstain from this matter pursuant to *Younger* and *Cedar Rapids* to allow the judicial review proceedings in state court to continue pursuant to Iowa Code § 17A.19.

Dated May 16, 2011.

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ATTORNEYS FOR
DEFENDANTS

IN THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Sprint Communications
Company, L.P.,
Plaintiff

Case No. 4:11-cv-
00183-JAJ-RAW

vs.

Robert B. Berntsen,
Krista Tanner, and
Darrell Hanson, in their official
capacities as Members of the Iowa
Utilities Board,
Defendants.

SPRINT'S OPPOSITION TO THE DEFENDANTS' MOTION TO ABSTAIN

The Supreme Court and the Eighth Circuit have long recognized the district courts' "'virtually unflagging obligation'" to decide cases brought before them, emphasizing that "[t]his obligation does not evaporate simply because there is a pending state court action involving the same subject matter." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops, Inc.*, 48 F.3d 294, 297 (8th Cir. 1995) (quoting *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)). Nevertheless, the Defendants ask this Court to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), for precisely that

reason — that is, simply because Sprint has chosen to bring both a federal- and a state-court challenge to the same order of the Iowa Utilities Board.

But the mere existence of a related state-court proceeding has never been enough to warrant abstention under *Younger*; on the contrary, abstention is appropriate only if the federal proceeding would *interfere* with ongoing state judicial proceedings — for example, by enjoining an ongoing criminal case. The Defendants have not even attempted to demonstrate interference here; rather, they have merely asserted that Sprint's claims *could* be resolved in the state proceeding. Defendants could not, moreover, possibly demonstrate the requisite interference here: the crux of their complaint is merely that Sprint chose to bring parallel affirmative litigation in both state and federal court. But "interference is not present merely because a *plaintiff* chooses to instigate parallel affirmative litigation in both state and federal court." *Green v. City of Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001).

The motion must also be denied because courts are authorized to abstain under *Younger* only when the state case is a criminal proceeding or a similar proceeding such as a state-initiated "civil enforcement proceeding." The state proceeding at issue here was initiated by Sprint in order to redress a wrong committed by the state. It is therefore not the sort of "coercive" state enforcement proceeding to which *Younger* could apply.

BACKGROUND

This case is a challenge to an order of the Iowa Utilities Board ("IUB"). Sprint alleges that the order is pre-empted by federal law and has asked this Court to enjoin the Defendants, who are Members of the IUB, from enforcing the order.

Shortly after filing this action, Sprint sought to preserve potential state-law remedies by filing a petition for review of the IUB's order in the Iowa District Court for Polk County. Sprint's state-court petition for review asserts primarily issues of state law not raised here. In an abundance of caution, however, Sprint also alleged in its state-court petition that the IUB's order is pre-empted by federal law.

Although Sprint would have preferred to proceed with the case in this Court before bringing any action in state court, the Iowa statute providing for judicial review provides only a short window to seek judicial review of administrative action, and Sprint filed its state-court action on the last possible day to initiate state-court review. To allow the federal case to go forward without the risk of duplicative proceedings, however, Sprint filed a motion to stay the state case pending resolution of this case. A week later, the Defendants filed the motion at issue here, which asks this Court to abstain under the doctrine of *Younger v. Harris*.

ARGUMENT

As the Defendants recognize, the decision whether to abstain is governed by a three-prong test outlined by the Supreme Court in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and applied by the Eighth Circuit in *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002). Under that test, abstention is permissible only if (1) the remedy in this proceeding would interfere with "an ongoing state judicial proceeding"; (2) the proceeding "implicates important state interests" sufficient to trigger *Younger*; and (3) "that proceeding affords an adequate opportunity to raise the federal questions presented." *Cedar Rapids Cellular*, 280 F.3d at 879. The Defendants have failed to meet either the first or second prong of the analysis. As explained below, the Defendants have not even attempted to establish that the remedy in this proceeding would interfere with any state judicial proceeding. Nor could they: the crux of their complaint is that Sprint has chosen to challenge the same IUB order in both federal and state courts, but the courts have consistently held that this does not establish interference. Moreover, the state judicial proceeding at issue here does not implicate important state interests of the sort that warrant abstention. As the Eighth Circuit and numerous other circuits have noted, these interests arise only in criminal proceedings or in certain state-initiated "civil enforcement proceedings" — not in a lawsuit initiated by the same party who initiated the federal proceeding. Thus, the Defendants' motion must be denied.

I. Abstention Is Inappropriate Because the Defendants Have Failed to Demonstrate that this Proceeding Would Interfere with the State Proceeding.

A. Under the First *Middlesex* Factor, the Defendants Must Show that the Relief in this Proceeding Would Interfere with a State-Level Proceeding.

As the Eighth Circuit has recognized, "[t]he moving force behind *Younger*" is comity between the federal and state judiciary — the idea that federal courts ought not "unduly interfere with ongoing state judicial proceedings." *Cedar Rapids Cellular*, 280 F.3d at 881. Thus, *Younger* abstention would apply here *only* if the Defendants could show that "the relief sought" in this proceeding "would unduly interfere with ongoing state judicial proceedings." *Id.*

Although actual interference is the cornerstone of the *Younger* analysis, the Defendants do not even address it in their motion, emphasizing instead the mere *existence* of a state-level judicial proceeding that affords an opportunity to address the same issues as this proceeding. The Defendants apparently believe that this is enough to establish interference. But the very Eighth Circuit case on which they rely holds otherwise. In *Cedar Rapids Cellular Telephone*, the Eighth Circuit first recognized the existence of a state judicial proceeding, but then addressed "whether the relief sought by the appellants would unduly interfere with ongoing state judicial proceedings." *Id.*

The appellate courts in other circuits have come to the same conclusion, explicitly holding that the first prong of the *Middlesex* test requires proof of *actual interference*, not the mere existence of a state-level judicial proceeding. As the Eleventh Circuit explained in *Foster Children v. Bush*, "we join our sister circuits in explicitly stating that an essential part of the first *Middlesex* factor in *Younger* abstention analysis is whether the federal proceeding will interfere with an ongoing state court proceeding. If there is no interference, then abstention is not required." 329 F.3d 1255, 1276 (11th Cir. 2003); *accord FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996) (explaining that under the first *Middlesex* factor, "there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere"); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999) (first *Middlesex* factor is that federal proceedings would "(1) interfere with an ongoing state judicial proceeding"); *cf. Green*, 255 F.3d at 1093-95 (reversing district court for applying *Middlesex* factors without considering whether federal proceeding would interfere with state-level proceeding).

In short, a relationship between a federal action and a state action is not enough to warrant abstention. Rather, it is necessary to show that granting relief the federal action would *interfere with* the state action and the Defendants have not recognized their duty to show interference.

B. The Remedy Sought Here Would Not Interfere with any State-Level Proceeding.

Although this Court could properly deny the Defendants' motion because they have failed even to attempt to shoulder their burden of addressing interference, it bears emphasis that the remedy Sprint seeks in this case would not interfere with the action it filed in state court. This should come as no surprise: Sprint filed both this action and the action in state court; it would make no sense for it to seek relief in one court that would interfere with the case it has voluntarily brought in another court.

The crux of the Defendants' argument seems to be that a decision in this case might "halt [one portion of] the ongoing state proceedings," presumably because this Court's ruling on the pre-emption issue would collaterally estop relitigation of that issue in the state court. (Def. Mot. at 3.) But the possibility of collateral estoppel simply does not qualify as "interference" for *Younger* purposes. *See Marks v. Stinson*, 19 F.3d 873, 885 (3d Cir.1994) (allowing federal plaintiff to pursue "parallel actions in the state and federal court" and noting that "the mere fact that a judgment in the federal suit might have collateral effects in the state proceeding *is not interference for* Younger *purposes.*") (emphasis added); *Green*, 255 F.3d at 1097 ("In short, as the Court has often repeated, the 'mere potential for conflict in the results of adjudications,' . . . is not the kind of 'interference' that merits federal court abstention.").

Nor is it relevant whether the parallel state and federal proceedings could result in duplicative proceedings. Although Sprint has sought to minimize the risk of duplication by asking the Iowa court to stay the state case until this case is decided, the courts have emphasized that "[s]ince the possibility of duplicative litigation is a price of federalism, the prospect of such duplication, without more, does not constitute interference with state court proceedings justifying a federal court's dismissal of a case properly within its jurisdiction." *Green*, 255 F.3d at 1098.

In short, the Defendants have not and could not establish the requisite interference to support abstention in this case — and interference simply cannot be found when a plaintiff institutes parallel actions in federal and state courts.

II. The State Proceeding Does Not Implicate the Type of "Important State Interests" that Trigger Abstention under *Younger*.

Putting aside the issue of interference, *Younger* abstention is also inappropriate because the state-level proceeding does not implicate the type of "important state interest" that triggers abstention. The courts have traditionally found such an interest mainly in state-level *criminal* proceedings: in *Younger* itself, for example, the Supreme Court ruled quite narrowly that "a district court erred in enjoining a state *criminal prosecution*." *Cedar Rapids Cellular*, 280 F.3d at 879 (emphasis added). And while the courts have recognized an important state interest in a limited number of "coercive" civil

cases that are similar to criminal proceedings — for example, "state civil enforcement actions," in the parlance of the Eighth Circuit, *see id.* — they recognize no such interest in a privately-initiated civil lawsuit such as the one at issue here.

The reason is simple. As the Third Circuit has explained, when "the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts." *Harris v. Pernsley*, 755 F.2d 338, 344 (3d Cir. 1985) (internal quotation omitted). Therefore, it is well settled that *Younger* abstention simply is not appropriate when the plaintiff in the state action is also the plaintiff in the federal action. *E.g.*, *Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir. 2010) ("Therefore, Younger does not apply when 'the federal plaintiffs are also *plaintiffs* in the state court action' and 'the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts.'") (citation omitted); *Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1117 (3d Cir. 1986) (*Younger* abstention was inappropriate because "the federal plaintiffs . . . are also the state plaintiffs"); *Wexler v. Lepore*, 385 F.3d 1336, 1340 (11th Cir. 2004) ("The *Younger* doctrine does not require abstention merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts.").

The state-level proceeding in this case simply is not the sort of coercive "state enforcement action"

that is subject to *Younger*. As the Defendants concede, the "judicial proceedings in state court" were "also brought by Sprint" (Def. Mot. at 3) in order to challenge unlawful state action, not by the state in order to punish Sprint for violating the law. *Cf. Wyatt v. Keating*, 130 F. App'x. 511, 514-15 (3d Cir. 2005) (*Younger* deference not appropriate when state proceeding was brought "at his own option to remedy a perceived wrong by the state" rather than by "the state to penalize an alleged violation of law"); *Brown ex rel. Brown v. Day*, 555 F.3d 882, 892 (10th Cir. 2009) (holding that a state proceeding can trigger *Younger* abstention only if it is "coercive," meaning that "the federal plaintiff had engaged in misconduct and sought to block proceedings that would ultimately impose punishment for that misconduct"). The state court proceeding in this case is thus unlike any "civil enforcement action" in which the Eighth Circuit — or any other circuit — has previously allowed abstention. *Cf. Cedar Rapids Cellular*, 280 F.3d at 877 (the "civil enforcement action" was brought by the Iowa Attorney General alleging that a company "is violating numerous provisions of the Iowa Consumer Credit Code").

CONCLUSION

The Defendants' motion to abstain should be denied

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Sprint Communications Company, L.P.,
Plaintiff

Case No. 11-cv-183

v.

Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their official capacity as Members of the Iowa Utilities Board,
Defendants.

REPLY TO SPRINT'S OPPOSITION TO MOTION FOR ABSTENTION

INTRODUCTION

Sprint resists the Defendants' motion for abstention on two claims: (a) the federal court proceedings will not unduly interfere with the state court proceedings and (b) the state court proceedings do not implicate important state interests. Both claims are in error.

First, Sprint's assertions regarding undue interference are largely based on *Green v. City of Tucson*, 255 F.3d 1086 (9th Cir. 2001). However, *Green's* analysis of the undue interference requirement for *Younger* abstention is no longer

good law; the Ninth Circuit reversed *Green's* holding that direct interference is required in *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004). Under the correct standard, this case demonstrates undue interference with an ongoing state judicial proceeding.

Second, as described in the brief filed in support of Defendants' motion for abstention, Iowa has an important interest in enforcing public utility tariffs that are filed with and approved by the Iowa Utilities Board, as expressed in state law, in order to regulate the intrastate interconnections of telecommunications utilities to protect the public from unfair business practices.

ARGUMENT

1. This Proceeding Would Unduly Interfere With the State Proceeding

Sprint asserts that the remedy it seeks in this case would not interfere with the state judicial review proceedings involving the same Iowa Utilities Board order. In doing so, Sprint relies on the Ninth Circuit's decision in *Green* for the proposition that direct interference is required and the mere possibility of collateral estoppel does not qualify as interference for *Younger* purposes. (Opp. at pp. 5-6.) However, *Green* is no longer good law; the Ninth Circuit has reconsidered and corrected *Green* on this very point, concluding "we recede from our statements in *[Green]* that direct interference is a threshold requirement, or element, of *Younger* abstention...." *Gilbertson*, 381 F.3d at 969. In other

words, "*Gilbertson* did overrule *Green*'s holding that "'*direct* interference"' is a threshold requirement of *Younger* abstention...." *AmerisourceBergen Corp. v. Roder*, 495 F.3d 1143, 1149, n. 9 (9th Cir. 2007, emphasis in original).

The *Gilbertson* Court analyzes *Younger* abstention at some length to reach the decision that *Green* was incorrect. Along the way, the *Gilbertson* Court concludes that the *Younger* principles apply to actions for injunctive relief, declaratory relief, and actions at law because they all have the same practical effect of interfering with the state action (381 F.3d at 968-70), following the reasoning stated by the Supreme Court in *Samuels v. Mackell*, 401 U.S. 66 (1971): If the decision in the federal court proceedings will be res judicata with respect to the state court proceedings, preventing the state court from deciding the issue for itself, then "the federal court has virtually lifted the case out of the State [court] before it could be heard." (Id. at 72, quoting *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 247 (1952), alterations in original, internal quotation marks omitted.) Further, if the federal judgment does not have preclusive effect on the state court proceedings, then "the federal judgment serves no useful purpose as a final determination of rights." (Id.)

Thus, the *Gilbertson* Court reasons that if the federal court proceedings will have preclusive effect on the state court proceedings, then sufficient interference has been shown to satisfy the "interference" requirement for *Younger* abstention,

both on grounds of federalism and on the grounds of comity. (381 F.3d at 971-72.)

For all of these reasons, the Ninth Circuit in *Gilbertson* rejects the "direct interference" requirement it previously adopted in *Green*, saying that "our course must be corrected" because "the Supreme Court has never required that interference be 'direct' in the manner we described in *Green*." (381 F.3d at 976-77.) In the end, "*Younger* abstention involves only such interference as the Supreme Court described in *Samuels*-that which would have the same practical effect on the state proceeding as a formal injunction. Preclusion rules may be relevant to determining the practical effect of a federal court's relief." (381 F.3d at 977-8.)

In the present circumstances, this Court's ruling on the issue of whether the Iowa Utilities Board order is preempted by federal law would collaterally estop litigation of that issue in the state court. Sprint admits as much at page 5 of its opposition. Thus, a decision by this Court would necessarily lift this issue out of the state court before it could be decided (given Sprint's motion to stay the state court proceedings pending this Court's decision). Under *Samuels*, *Public Service Commission*, and *Gilbertson*, that is sufficient to show interference. The same issue has been raised in the state court proceedings, where it can be decided, and where the state's unique interest in preserving its statutes, standards, and procedures for review of administrative action by state agencies under Iowa Code § 17A.19 can be served.

Sprint also relies on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), for the proposition that "the possibility of collateral estoppel does not qualify as 'interference' for *Younger* purposes." (Opposition at 5.) *Marks*, in turn, relies upon *Gwynedd Properties, Inc., v. Lower Gwynned Township*, 970 F.2d 1195, 1200-1203 (3d Cir. 1992) as the sole support for this proposition. But *Gwynned* is not really concerned with collateral estoppel. Instead, the point of *Gwynned* is that the plaintiff sought relief on certain claims in the federal court that would not interfere with the state proceedings, and only those claims were permitted to go forward. The plaintiff in *Gwynned* conceded abstention was appropriate for claims that would interfere with the state proceedings. 970 F.2d at 1201. The claims that were permitted to go forward did "not seek to enjoin any state proceedings, nor [did they] challenge the legality of any township or municipal ordinance." (Id.) In this case, in contrast, Sprint seeks to enjoin enforcement of an Iowa Utilities Board order and challenges the legality of that order.

Thus, while the overly broad language of *Marks* might appear to support Sprint's position in this case, a closer examination of the case and its underlying authority reveals that the "interference" principle explained in *Gilbertson* is correct: The preclusion rules of *Younger* apply with equal effect to any federal court proceeding that has the same effect on a pending state proceeding as an injunction. (381 F.3d 971.) A declaration by this Court on the preemption issue would have the same effect on the state court's analysis of the same issue as if this

Court were to issue an injunction. The *Younger* interference requirement is satisfied.

2. The State Proceedings Implicate Important State Interests

In the brief in support of motion for abstention, the Defendants explained that the state's interest in enforcing public utility tariffs is an important one, citing state and federal statutes and *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002) (Brief at 3, 5). Sprint does not take issue with those statements; instead, it asserts that *Younger* does not apply because the state-level proceeding is not a "coercive" enforcement action. However, Sprint's own cited authority, *Brown ex rel. Brown v. Day*, 555 F.3d 882 (10th Cir. 2009), reveals otherwise.

Some courts have held that *Younger* abstention applies to state administrative proceedings that are coercive, not to those that are remedial.[1] According to at least one court, a proceeding is coercive if initiated by the state, before a state forum, to enforce a violation of state law; it is remedial if initiated by a private person "to remedy a

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[1] The Eighth Circuit has described the distinction in terms of judicial vs. legislative action, see *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1143 (8th Cir. 1990) and cases cited therein. Under that terminology, the Board's action in this case is clearly judicial, as the agency investigated, decided, and enforced Sprint's liability as it stood on present and past facts and under existing laws. Id. For ease of reference, however, the Defendants will use the coercive/remedial language used by Sprint.

perceived wrong by the state." *Wyatt v. Keating*, 130 F.App'x. 511, 514 (3d Cir. 2005) (unpublished; cited by Sprint in Opposition at page 7). Sprint notes that it initiated the state court proceedings and concludes that *Younger* abstention does not apply. This argument oversimplifies the distinction between "coercive" and "remedial" proceedings.

As the *Brown* Court said, a proceeding is "coercive" if "the federal plaintiff had engaged in misconduct and sought to block proceedings that would ultimately impose punishment for that misconduct." 555 F.3d at 892. That aptly describes the situation before this Court. Sprint, the federal plaintiff, engaged in misconduct when it made a unilateral decision to withhold access charge payments from Iowa Telecom[2] based upon Sprint's conclusion that certain long distance telephone calls were no longer telephone calls, but were instead "information services" to which interexchange access charges do not apply. The Iowa Utilities Board order at issue found that Sprint's conclusion was incorrect, that Sprint had wrongfully withheld disputed access charge payments and wrongfully offset past disputed charges against current undisputed charges, and that Sprint should pay Iowa Telecom the amounts owed in compliance with Iowa Telecom's switched access tariff. Thus, Sprint is a federal plaintiff that engaged in misconduct and seeks to block proceedings redressing that misconduct, satisfying the *Brown* Court's definition of a "coercive" proceeding.

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[2] Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, n/k/a Windstream Iowa Communications, Inc.

Sprint's Opposition could be read to imply that because the state court proceedings were initiated by a private party, rather than by the State, *Younger* abstention does not apply. (Opposition at 6-7.) It is sufficient to note that *Younger* abstention has often been applied to proceedings that were initiated by a private party; see, for example, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). The public vs. private identity of the plaintiff may sometimes be a factor to be considered, but the important question is whether "the State's interests in the proceeding are so important that the exercise of the federal judicial power would disregard the comity between the States and the National Government." 481 U.S. at 7. Here, Sprint has not responded to the assertion in the Defendants' brief in support of the motion for abstention that the state has an important interest in requiring that telephone companies pay intercarrier compensation in a manner required by statute and by approved tariff in order to protect and advance the public interest in a functional telecommunications system.

CONCLUSION

The Board urges the Court to abstain from this matter pursuant to *Younger* and *Cedar Rapids* so that the judicial review proceedings in state court can continue pursuant to Iowa Code § 17A.19.

Dated June 10, 2011.

Respectfully submitted,

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PETITIONER'S BRIEF

No. 12-815

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit**

BRIEF FOR THE PETITIONER

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JUNE 28, 2013

QUESTION PRESENTED

Whether the Eighth Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is, instead, "remedial."

RULE 29.6 STATEMENT

Sprint Communications Company, L.P., ("Sprint") is a limited partnership organized under Delaware law that primarily provides telecommunications services to the public. Sprint's partners include U.S. Telecom, Inc., Utelcom, Inc., UCOM, Inc., and Sprint International Communications Corporation—all of which are direct or indirect wholly owned subsidiaries of Sprint Nextel Corporation. Sprint Nextel Corporation is the publicly traded company resulting from the merger of Sprint Corporation and Nextel Communications, Inc., which was consummated on August 12, 2005. Sprint Nextel is a publicly traded corporation with no parent company. No other public company owns 10 percent or more of Sprint Nextel's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Statutory and Regulatory Background 3

B. Procedural Background 6

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE ESTABLISHING THE PRIMACY OF THE FEDERAL JUDICIARY IN DECIDING QUESTIONS OF FEDERAL LAW 14

II. THE EIGHTH CIRCUIT ERRED IN ABSTAINING UNDER *YOUNGER* 19

A. This Case Does Not Implicate the Purposes of Abstention 19

B. The Cases on Which the Eighth Circuit Relied Do Not Support Abstention Here 24

C. The "Coercion" Requirement Adopted by Nearly Every Circuit Properly Reflects this Court's *Younger* Jurisprudence 29

III. THE EIGHTH CIRCUIT'S DECISION IMPROPERLY CONFLATED THIS COURT'S *BURFORD* AND *YOUNGER* ABSTENTION DOCTRINES 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page

Cases

Alleghany Corp. v. McCartney,
896 F.2d 1138 (8th Cir. 1990) 7, 17-18

Amanatullah v. Colorado Bd. of Med. Exam'rs,
187 F.3d 1160 (10th Cir. 1999).....30

Brown ex rel. Brown v. Day,
555 F.3d 882 (10th Cir. 2009) 29-30

Burford v. Sun Oil Co.,
319 U.S. 315 (1943)..... 13, 20-23, 32-33

Chicot County Arkansas v. Sherwood,
148 U.S. 529 (1893).....19

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976).....9, 11, 15, 21

England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) 3, 14-15

Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc., 48 F.3d 294 (8th Cir. 1995).... 14-15

Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001), *limited on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004).....28

GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000).....34

Guillemard-Ginorio v. Contreras-Gómez,
585 F.3d 508 (1st Cir. 2009).....31

Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011) 10

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 22

Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc., 551 F.3d 587 (7th Cir. 2008) 10

Juidice v. Vail, 430 U.S. 327 (1977) 22-23

Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) 15, 21

Majors v. Engelbrecht, 149 F.3d 709 (7th Cir. 1998) 30-31

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 12, 26-30

Minnesota Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007) 6

Moore v. Sims, 442 U.S. 415 (1979) 22

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 4

New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 12, 19-27, 29-34

Night Clubs, Inc. v. City of Fort Smith, 163 F.3d 475 (8th Cir. 1998) 7

Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986) 13, 26, 31-32

O'Neill v. City of Philadelphia, 32 F.3d 785 (3d Cir. 1994) 32

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).....31

Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987).....23

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)..... 19-20

Thomas v. Texas State Bd. of Med. Exam'rs, 807 F.2d 453 (5th Cir. 1987) 7-8

Trainor v. Hernandez, 431 U.S. 434 (1977).....22

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002) 11, 14-16, 18

Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F. Supp. 2d 993 (D. Minn. 2003).....5

Willcox v. Consol. Gas Co., 212 U.S. 19 (1909).....15

Younger v. Harris, 401 U.S. 37 (1971)..... 2-3, 7, 12-13, 21-23, 32

Zablocki v. Redhail, 434 U.S. 374 (1978).....34

Statutes and Other Legislative Authorities

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 .....7, 16

28 U.S.C. § 1332 7

28 U.S.C. § 1651 7

28 U.S.C. § 2201 7

28 U.S.C. § 2202.....7

47 U.S.C. § 152 2
47 U.S.C. § 153 2
47 U.S.C. § 153(24) 4
47 U.S.C. § 153(53) 4
47 U.S.C. §§ 201-276 4
47 C.F.R. § 64.702 2

Other Authorities

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commc'ns Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905 (1996) 5

Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecomms. nor a Telecomms. Serv., 19 FCC Rcd. 3307 (2004) 5

Vonage Holdings Corp. Petition for Declaratory Ruling re an Order of the Minnesota Pub. Utils. Comm'n, Mem. Op. and Order, 19 FCC Rcd. 22,404 (2004) 6

In the

Supreme Court of the United States

No. 12-815

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Eighth Circuit (Pet. App. 1a-10a) is reported at 690 F.3d 864 (8th Cir. 2012). The order of the United States District Court for the Southern District of Iowa, Central Division, is reprinted at Pet. App. 11a-27a. The order of the Iowa Utilities Board (Pet. App. 60a-158a) is available at 2011 WL 459686, and the Board's order denying reconsideration (Pet. App. 28a-59a) is available at 2011 WL 1148175.

JURISDICTION

The judgment below was entered on September 4, 2012. A 30-day extension for filing this petition was granted on November 19, 2012, making the deadline January 2, 2013. *See* Application No. 12A499. The petition was granted on April 15, 2013. On April 30, 2013, this Court extended the time by which this brief is due to June 28, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Portions of the following relevant provisions are reprinted in the Appendix accompanying the Petition for a Writ of Certiorari at 159a-162a: 47 U.S.C. §§ 152 and 153; and 47 C.F.R. § 64.702.

STATEMENT

This case arises from Sprint's efforts to obtain federal-court review of complex issues of federal telecommunications law arising under the Telecommunications Act of 1996 ("1996 Act" or "Act"). The case began before the Iowa Utilities Board ("IUB") as a commercial dispute between Sprint and Iowa Telecom (now Windstream) over "access charges," a kind of "intercarrier compensation" or payment made between telephone companies. After the IUB construed the relevant provisions of the 1996 Act in Windstream's favor, Sprint sought review of the agency's interpretation of the Act in federal district court, while also making a protective filing in state court. The state filing was necessary only because existing Eighth Circuit law appeared to understand abstention under *Younger v.*

Harris, 401 U.S. 37 (1971), extremely broadly, raising a serious risk that Sprint would be barred from federal court *after* the time for appeal to state court had run. And, indeed, the district court—applying the Eighth Circuit's uniquely broad understanding of *Younger* abstention—did decline to review Sprint's 1996 Act claims in deference to the state court. The Eighth Circuit affirmed, resulting in a sharp departure from this Court's jurisprudence establishing the "primacy of the federal judiciary in deciding questions of federal law," *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-16 (1964), and a deep split in the circuits regarding the proper application of *Younger*.

A. Statutory and Regulatory Background.

Although the proper application of *Younger* is the only issue before this Court, understanding the procedural posture of this case requires some discussion of the statutory and regulatory background.

Telecommunications carriers whose customers make (or "originate") calls are sometimes required to pay "access charges" to the carriers that deliver (or "terminate") those calls to their customers. Access charges may be either intrastate or interstate, depending on whether the call traverses state lines. Traditionally—*i.e.*, for calls made over the Public Switched Telephone Network ("PSTN")—this distinction between "intrastate" and "interstate" calls dictated whether federal or state regulators had authority to regulate a call. State regulators regulated intrastate calls, while federal regulators regulated interstate calls.

This case, however, concerns "Voice over Internet Protocol" ("VoIP") calls rather than traditional telephone calls. The particular VoIP calls at issue here originated on the cable broadband network of a cable company with which Sprint had a business arrangement. During the initial Internet leg of this kind of VoIP call, the caller's voice is translated into digital packets and routed over an Internet Protocol ("IP") network. Subsequently, those packets are transformed by Sprint into a traditional telephone signal, which may be terminated over the PSTN by a telephone company (like Windstream) serving the called party.

For such VoIP calls, the question whether access charges apply is closely connected to the question of which regulators have authority to regulate the calls. Under the 1996 Act, authority to regulate no longer turns on whether calls are "interstate" or "intrastate." Instead, the issue is whether VoIP is an "information service" under the 1996 Act, 47 U.S.C. § 153(24), or a "telecommunications service," *id.* at § 153(53). Pet. App. 161a. Federal law—administered by the FCC—requires information services to remain largely unregulated,[1] while telecommunications services are subject to joint regulation by state and federal regulators.[2]

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[1] *See* Pet. App. 162a.

[2] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 965 (2005) ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers."); 47 U.S.C. §§ 201-276 (regulating common carriers); Pet. App. 159a (state authority).

The question of what makes an offering an "information service" under the 1996 Act is often difficult. The FCC has proposed general guidelines for distinguishing information services from telecommunications services and, as particularly relevant to this case, has stated that a service is an information service if it "enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol" (known as "net protocol conversion").[3] As noted above, the VoIP calls at issue in this case are made by end users with cable broadband Internet access. These calls are first carried over packet-switched networks, but later converted to traditional telephone signals and handed off by Sprint to local exchange carriers like Windstream for termination. Sprint initially paid access charges for these calls, but ultimately concluded that it was not required to do so because they enter the network in one protocol and exit the network in a different protocol, thus undergoing net protocol conversion.[4]

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[3] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commc'ns Act of 1934, As Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905, 21,956-57 ¶¶ 104, 106 (1996).

[4] *Cf. Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecomms. nor a Telecomms. Serv.*, 19 FCC Rcd. 3307, 3314 ¶11 (2004) (finding that Pulver's Free World Dialup VoIP service was an information service); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (finding that Vonage's VoIP is an information service and that Congress has "occup[ied] the field of regulation of information services," so Minnesota

As explained above, federal law requires "information services" to remain largely unregulated by the states, so only the FCC—and not state regulatory commissions—could decide to impose access charges on these calls. Because the FCC had not done so, Sprint concluded that the calls at issue were not subject the traditional access-charge regime.

B. Procedural Background.

Upon concluding that the VoIP calls at issue here are an information service not subject to access charges, Sprint began disputing access charges assessed by Windstream for such calls and also withholding payment. In response, Windstream threatened to disconnect Sprint's service and effectively block calls to and from Sprint's customers. On January 6, 2010, Sprint filed a complaint with the IUB seeking a declaration that, under the terms of Windstream's tariff, it was proper for Sprint to dispute Windstream's imposition of access charges for terminating VoIP calls and to withhold disputed amounts. 8th Cir. J.A.4 ¶ 15. Sprint did *not* ask the IUB to resolve the underlying question whether VoIP

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could not impose telecommunications regulation on VoIP). The FCC subsequently preempted the Minnesota PUC's efforts to regulate Vonage on alternate grounds, and that order was affirmed by the Eighth Circuit (without addressing the views of the *Vonage* district court). *See Vonage Holdings Corp. Petition for Declaratory Ruling re an Order of the Minnesota Pub. Utils. Comm'n*, Mem. Op. and Order, 19 FCC Rcd. 22,404 (2004); *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 574-76 (8th Cir. 2007).

calls may properly be subjected to intrastate access charges, *id.* at 4 ¶ 16, but rather maintained that the issue is a fundamental question of federal law and policy that *only* the FCC may answer. The IUB disagreed, and issued a 50-page analysis both claiming authority to decide the issue and concluding that federal law *does* permit imposing access charges on VoIP calls. At the conclusion of the Board proceedings, Sprint repaid *all* monies to Windstream that it had disputed and withheld, and has likewise paid all of the invoices that Windstream has since issued.

But Sprint also filed a complaint in federal district court arguing that the IUB lacked authority under the Act to determine whether access charges apply to VoIP traffic, and that in any event the imposition of such charges is inconsistent with federal law. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1651, 2201, and 2202.

Sprint's counsel determined, however, that prudence required *also* petitioning for review of the IUB order in Iowa District Court. The state-court filing was necessary because: 1) existing Eighth Circuit law already appeared to understand *Younger* abstention extremely broadly, *see, e.g. Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475, 481 (8th Cir. 1998), so counsel recognized the danger that the federal district court might decline to hear Sprint's appeal; and 2) the Eighth Circuit had held—contrary to the Fifth Circuit—that "a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies," *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1144 (8th Cir. 1990), even though other circuits would not require abstention in the absence of a pending state proceeding, *see Thomas v.*

Texas State Bd. of Med. Exam'rs, 807 F.2d 453, 456 (5th Cir. 1987) ("[M]ere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of *Huffman*."). Taken together, these rules raised the risk that the federal court would abstain—but only after the statutory time period for filing in state court had expired, thus leaving Sprint with no forum in which to challenge the IUB's decision.

Sprint therefore filed for review in state court shortly after filing its federal complaint. In its state-court filing, Sprint appealed both state-law (tariff) issues and the federal-law issues on which the IUB had primarily focused. To allow the federal case addressing only the central federal issue in Sprint's dispute with Windstream to go forward without the risk of duplicative proceedings, Sprint filed a motion to stay the state case pending resolution of the federal case. Although that motion was never granted, the parties agreed to continue the hearing on it pending resolution of the abstention issues before the federal district court and later the Eighth Circuit. The effect of that agreement was similar to a stay during the lower federal court proceedings on abstention.

In federal court, Sprint argued that *Younger* does not apply to this case because—like all abstention doctrines—it is fundamentally about protecting a state's ability to administer, interpret, and enforce its *own* laws, while Sprint's federal case has nothing to do with any of those things. Rather, Sprint argued, this case is about Sprint's basic right to obtain review in *federal* court of an issue of *federal* law. The district court ruled against Sprint on very

broad grounds, finding that "Sprint's state court action ... is properly characterized as an appeal from the IUB orders," and that "a state court's review" of a state agency decision is "an uninterruptible process under the *Younger* doctrine." Pet. App. 24a.

The district court's holding that state-court review of a state-agency decision—even review of issues of federal law arising in a civil dispute concerning the meaning of the 1996 Act—is an "uninterruptible process" was nothing short of alarming. The clear implication was that, under *Younger*, *all* state-agency adjudications of garden-variety commercial disagreements regarding the meaning of federal law must be appealed *only* through the state system—even where, as in this case, a federal district court unquestionably has *jurisdiction* to hear federal law issues presented to it.

Sprint accordingly appealed to the Eighth Circuit, arguing that the lower court's broad holding would allow *Younger* to defeat the district courts' "virtually unflagging obligation" to decide cases subject to their jurisdiction in a broad range of proceedings. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Sprint urged the Eighth Circuit to construe its *Younger* test more narrowly than the district court had done. In particular, Sprint argued that the court should construe the "state interest" prong of its test for *Younger* abstention to mandate the kind of *coercive* state interest that other courts of appeals require. Sprint maintained that run-of-the-mill, *remedial* state-agency adjudications of commercial disputes, unlike state criminal and quasi-criminal proceedings, do not implicate the coercive state interests to which *Younger* applies.

After briefing on this case in the Eighth Circuit but before oral argument, the Eighth Circuit issued a decision in a different case expressly *rejecting* the coercive/remedial distinction advanced by Sprint here, but also acknowledging that other circuits find that distinction "outcome determinative" under *Younger*. *See Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011). *Hudson* thus suggested that the Eighth Circuit's *Younger* standard requires abstention in essentially all state-agency proceedings, but the court did leave open the possibility that abstention might not apply in cases involving a "pervasive federal regulatory scheme." *Id.* at 988. At oral argument, Sprint emphasized that this case *does* involve a pervasive federal regulatory scheme—the 1996 Act, under which state telecommunications regulators act as "deputized federal regulators." *Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 595 (7th Cir. 2008). The IUB, in contrast, boldly proclaimed that *Younger* abstention applies to *all* of its proceedings regardless of the legal regime involved—*i.e.*, that review of IUB decisions is available only through the state court system.[5]

The Eighth Circuit's decision below reaffirmed *Hudson*, rejecting Sprint's claim that the state-interest prong of the Eighth Circuit's *Younger* test was not met because the IUB proceeding was not coercive. Pet. App. 6a. The court also closed the door

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[5] The Eighth Circuit's recording equipment malfunctioned during argument so there is no record of the IUB's position. At the certiorari stage, however, the IUB did not deny having taken that position at argument before the Eighth Circuit.

left open by *Hudson*, finding that because the state here has a "substantial, legitimate interest in regulating intrastate retail [telecommunications] rates," it makes no difference that this case involves a "pervasive federal regulatory scheme." *Id.* at 7a. In short, the Eighth Circuit upheld abstention in this case as a run-of-the mill application of its *Younger* standard, now clearly construed never to require a coercive state proceeding.

SUMMARY OF ARGUMENT

This Court has long held that federal district courts have a "virtually unflagging obligation" to decide cases subject to their jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 821 (1976). Consistent with that principle, the Court has specifically allowed for federal courts to review the decisions of state telecommunications regulators on issues of federal law, just as Sprint seeks here. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002). The Eighth Circuit failed to distinguish this case from *Verizon Maryland*.

The abstention doctrines are narrow *exceptions* to the general rule that the district courts should decide cases subject to their jurisdiction. The abstention doctrines reflect the fundamental principle that *state* courts should be allowed to interpret and administer *state* statutory, regulatory, and enforcement regimes without undue interference from *federal* courts. This case simply does not implicate those concerns—it is about the *federal* courts' authority (and, indeed, responsibility) to decide *federal* law issues. The Eighth Circuit failed to provide any reason why this

case implicates the policies underlying the abstention doctrine.

The Eighth Circuit's decision contains remarkably little discussion of this Court's *Younger* precedents, and the two lone cases upon which the court did rely—*New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans ("NOPSI")*, 491 U.S 350 (1989), and *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)—simply do not support its decision. Indeed, the court below failed even to mention the holding of *NOPSI*, which *rejected* abstention under either *Younger* or *Burford*. Moreover, *NOPSI* makes clear that *Younger* does *not* apply to judicial review of state-agency proceedings adjudicating garden-variety civil disputes between commercial parties, like the proceeding underlying this case. *Middlesex County* likewise does not support the decision below—the Eighth Circuit took the three-pronged *Younger* standard articulated there out of context, eliminating the critical threshold question (emphasized in *NOPSI*) whether the proceedings at issue are the *kind* of state proceeding to which *Younger* applies.

The coercion inquiry adopted by the vast majority of circuits serves to ensure that an administrative proceeding falls within the categories of cases described by *NOPSI* as potentially subject to *Younger*. *NOPSI* indicates that *Younger* applies only in certain kinds of cases that are akin to the criminal actions at the heart of the *Younger* doctrine—but the three-pronged *Middlesex County* test does not, on its face, impose such a limitation. The requirement of a state proceeding that is "coercive," as opposed to merely "remedial," harmonizes the limitations on *Younger* set forth in *NOPSI* with the *Middlesex*

County standard. That requirement is, moreover, consistent with this Court's clarification—in *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986)—of the line between state administrative proceedings to which abstention applies and those to which it does not.

Finally, the decision below thoroughly confuses abstention law by conflating *Younger* and *Burford* into a new, unrecognizably broad kind of abstention. *Burford* abstention permits the states to administer their regulatory regimes without undue interference from the federal courts. And the *Younger* cases prevent federal-court interference with state criminal and similar civil-enforcement regimes. This case falls far closer to the *Burford* line of cases than to the *Younger* cases because the state interests identified by the IUB in the district court—"enforcing the terms of telephone company tariffs and otherwise regulating the telephone companies" and the "protection of ... citizens" who make phone calls in Iowa (*see* 8th Cir. J.A.248-249)—were closely related to the *Burford* policy of non-intervention in state regulatory affairs. This Court's decision in *NOPSI*, however, clearly forecloses application of *Burford* to this case. As a result, the IUB carefully avoided *Burford* below, and instead convinced the Eighth Circuit to expand *Younger* beyond recognition.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE ESTABLISHING THE PRIMACY OF THE FEDERAL JUDICIARY IN DECIDING QUESTIONS OF FEDERAL LAW.

Sprint's federal complaint in this case presented *only* issues of federal law. J.A. 1a. Specifically, Sprint argued that the IUB lacked authority under the 1996 Act to determine whether access charges apply to VoIP traffic and that the IUB's finding that such charges do apply violated the Act. The Eighth Circuit's novel application of *Younger* to bar federal-court review of these federal law questions is inconsistent with this Court's longstanding general rule that "a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *England*, 375 U.S. at 417. This Court applied that rule in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), to allow federal-court review of the decisions of state telecommunications regulators on issues of federal law under the 1996 Act, just as Sprint seeks here. The Eighth Circuit erred in ignoring *Verizon Maryland*.

This Court has, of course, long emphasized the district courts' "virtually unflagging obligation" to decide cases brought before them over which they have jurisdiction, noting that "[t]his obligation does not evaporate simply because there is a pending state court action involving the same subject matter." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc.*, 48 F.3d 294, 297 (8th Cir. 1995)

(quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The Court's decision in *England* set forth the relationship between this general obligation and the abstention doctrines' exceptions to it. The Court first set out the general rule that federal courts must hear cases within their jurisdiction:

> Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction *** The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

England, 375 U.S. at 415. (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909)). Abstention, the Court further observed, provides *exceptions* to this rule in certain limited circumstances involving *state* law:

> Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." *Louisiana P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.

England, 375 U.S. at 415-16 (citation omitted).

This Court applied the general rule set forth in *Willcox* and *England* to a case very similar to this in *Verizon Maryland*, 535 U.S. 635, which confirms the

federal courts' authority to review state utility commission orders under the 1996 Act. *Verizon Maryland* involved Section 252 of the 1996 Act, which confers on state commissions the authority to approve and interpret "interconnection" agreements between incumbent local exchange carriers ("ILECs") and the competitive local exchange carriers ("CLECs") that the 1996 Act sought to encourage in order to provide consumer choice. *See* 535 U.S. at 638. In the state proceeding there, the Maryland PUC had found that Verizon Maryland owed WorldCom a kind of intercarrier compensation ("reciprocal compensation") under the terms of the agreement between the carriers. *Id.* at 639.

Verizon sought review in federal district court, arguing that the Maryland PUC's ruling was preempted by federal law, just as Sprint argued below in this case. *Id.* The Maryland Commission took the position that Verizon had no right to federal-court review. *Id.* at 642. This Court squarely rejected that argument, finding that Verizon was entitled to district-court review for the simple reason that its claim "falls within 28 U.S.C. § 1331's general grant of jurisdiction[.]" *Id.* at 643. *Verizon Maryland* thus applied the general rule that federal courts should decide issues of federal law whenever their jurisdiction is properly invoked to the very context at issue here—review of state PUC decisions on issues of federal law.

The Eighth Circuit failed to distinguish *Verizon Maryland*. In fact, the decision below initially purported *not* to "disagree" with Sprint's argument "that it had the right to challenge the IUB's order in federal court." Pet. App. 4a. But plainly the Eighth Circuit *did* disagree, concluding in no uncertain

terms that "Plaintiff's complaint shall be dismissed." Pet. App. 27a. It is frankly unclear from the Eighth Circuit's decision, however, *why* it disagreed.

The district court had clearly—albeit incorrectly, *see infra* at 25-26—held that "a state court's review of administrative judicial action is an uninterruptible process under the *Younger* doctrine," Pet. App. 241, such that Sprint was not entitled to federal-court review regardless of whether it sought relief in state court. Parts of the Eighth Circuit decision suggest the same view, consistent with the court's earlier decision in *Alleghany*, 896 F.2d at 1144 ("[A] party cannot avoid *Younger* by choosing not to pursue available state appellate" review of state agency decisions.). For example, the decision below indicates that "once a party initiates state 'judicial' proceedings" (where the quotation marks around "judicial" are presumably intended to connote proceedings of a judicial nature *in a state agency*), the "party must follow the proceedings through to the end" (where "the end" is presumably the end of state appellate proceedings). But the Eighth Circuit offered no explanation at all for why it thought this was so—and none exists.

Other snippets of the Eighth Circuit's decision (from the same paragraph) suggest a different view. As noted above, the court stated that it did not disagree with Sprint's view that it had "the right to challenge the IUB's order in federal court." Pet. App. 4a. But it then found that Sprint's "decision to file a state court petition for review" affects the *Younger* analysis. *Id.* In other words, parts of the Eighth Circuit's opinion appear to suggest that Sprint *would* have been entitled to federal-court review *but for* the fact that it had also filed in state court. But Sprint

only filed in state court because *Alleghany* had held that state proceedings are "ongoing" for *Younger* purposes until completion of state appellate review, and a federal plaintiff therefore cannot proceed in federal court even if it chooses not to file in state court at all. Against this backdrop, the Eighth Circuit's opinion is simply incomprehensible—it appears to hold that Sprint's case somehow could have gone forward in federal court, *except* that Sprint also filed in state court, as it was *required* to do by Eighth Circuit precedent.

In sum, the bottom line is that the Eighth Circuit refused to apply the general rule of federal-court review advanced by Sprint and rebuffed Sprint's efforts to obtain such review under *Verizon Maryland*. But why it did so is less obvious—neither of the possible reasons why it refused to apply the rule makes any sense. Again, perhaps the lower court refused to apply the rule based on the view that state proceedings are always "uninterruptible" all the way up through the state appellate process—but that is squarely inconsistent with *Verizon Maryland* itself. Or perhaps the Eighth Circuit refused to apply the general rule of federal jurisdiction to decide federal issues because Sprint had also made a protective filing in state court—but the filing was required by Eighth Circuit precedent, and, in any event, abstention is supposed to protect *state* interests unrelated to the plaintiff's choice of forum. Either way, the court below offered no cogent reason not to follow *Verizon Maryland*, and its failure to do so is sufficient grounds for reversal.

II. THE EIGHTH CIRCUIT ERRED IN ABSTAINING UNDER *YOUNGER*.

A. This Case Does Not Implicate the Purposes of Abstention.

Quite apart from *Verizon Maryland*, the review Sprint seeks here implicates none of the concerns that the abstention doctrines were designed to address. Again, this case is about the *federal* courts' authority (and, indeed, responsibility) to decide *federal* law issues. By contrast, the abstention doctrines reflect the principle that *state* courts should be allowed to administer *state* statutory, regulatory, and enforcement regimes without undue interference from federal courts.

The heart of the various abstention doctrines is that while the federal courts are generally "bound to proceed to judgment and to afford redress ... in every case to which their jurisdiction extends," *Chicot County Arkansas v. Sherwood*, 148 U.S. 529, 534 (1893), "there are some classes of cases" in which judges may exercise their common-law discretion to "withhold[] ... authorized equitable relief because of undue interference with state proceedings." *NOPSI*, 491 U.S. at 359. These "classes of cases" raising the specter of undue interference with state proceedings divide roughly into three main categories.

This Court recognized the first such category in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), which involved a constitutional challenge to an order of the Texas Railroad Commission requiring that a Pullman conductor (rather than a porter) be present in any train car with a sleeper. A federal district court had enjoined the Texas law on the ground that the relevant Texas

statutes did not authorize the order, but this Court reversed. The Court pointed out that the lower court's view of Texas law was not authoritative, but merely a "forecast," and that the "reign of law is hardly promoted if an unnecessary ruling of a federal court is [soon after] supplanted by a controlling decision of a state court." *Id.* at 499-500. *Pullman* abstention, then, requires a federal court to stay its hand when the resolution of unsettled questions of state law by the state courts may make it unnecessary to decide a federal constitutional question. This allows the state courts to provide needed (and authoritative) answers to state law questions without undue federal interference. *Pullman* abstention is thus essentially a doctrine of non-interference with state court interpretation of state law.

Two years after *Pullman*, the Court in *Burford* recognized a second class of cases in which federal courts may decline to exercise their jurisdiction. There, the plaintiff sought federal-court review of a Texas Railroad Commission order granting a permit to drill oil wells on the basis of that commission's rules specifying minimum spacing between wells but allowing exceptions to those rules in certain circumstances. Under Texas law, review of Railroad Commission orders was concentrated in the courts of Travis County, Texas, such that "the Texas courts [were] working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Burford*, 319 U.S. at 326. This Court found that the federal plaintiff's case raised "questions of regulation of the [oil] industry by the State administrative agency," and that "[c]onflicts in the interpretation of state law,

dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts" to review Railroad Commission orders. *Id.* at 332-34. Like *Pullman*, then, *Burford* abstention is a doctrine of non-interference with the state's administration of its own laws and regulations, reflecting a "reluctance to intrude into state proceedings where there exists a complex state regulatory system." *NOPSI*, 491 U.S. at 361 (quoting *NOPSI v. City of New Orleans*, 798 F.2d 858, 861-62 (5th Cir. 1986)).[6]

Younger is the third major category of abstention cases, first recognized by the Supreme Court decades after the *Pullman* and *Burford* cases in *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* case itself involved a state criminal prosecution that the defendant (the federal plaintiff) sought to enjoin on

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[6] "*Thibodaux*" abstention is closely related to *Burford* abstention; under *Thibodaux*, federal courts sitting in diversity jurisdiction may choose to allow a state court to decide issues of state law that are of great public importance to that state, to the extent that a federal determination would infringe on state sovereignty. *See generally Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). So-called *Colorado River* abstention, from *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), also bears brief mention here, although it is perhaps best considered not to be a doctrine of abstention at all—since it is prudential and discretionary—but rather a doctrine of "exceptional circumstances." In such circumstances—defined differently by different lower courts—it has been invoked where parallel litigation exists in federal and state courts to avoid wasteful duplicative litigation. It has not been raised in this case.

the ground that the state's criminal syndicalism law, under which he was charged, was unconstitutional. This Court held that Congress over the years has indicated that state courts should generally be permitted to "try state cases free from interference by federal courts," and indeed that to do otherwise would "unduly interfere with the legitimate [enforcement] activities of the States." *Younger*, 401 U.S. at 43-44.

This Court's subsequent cases have extended *Younger* to certain state civil proceedings akin to criminal cases. The opinion in *NOPSI*, 491 U.S. at 368, briefly reviews the *Younger* cases that extended the doctrine "to civil enforcement proceedings" and "even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." In the former category, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), extended *Younger* to a state action brought by a sheriff and prosecuting attorney to enforce a nuisance statute barring exhibition of obscene films; *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977), found that an action "brought by the State in its sovereign capacity" to recover welfare payments was subject to *Younger* abstention because it was part of the state's role in administering its public assistance programs; and *Moore v. Sims*, 442 U.S. 415, 423 (1979), held that a state action for temporary custody of children was like *Huffman*, since civil enforcement by the state in the context of suspected child abuse was in aid of and closely related to criminal statutes. In the latter category, *Juidice v. Vail*, 430 U.S. 327, 336 (1977), found that federal-court interference with a contempt proceeding in a civil case would be "an offense to the

State's interest ... every bit as great as it would be were this a criminal proceeding," (internal quotation marks omitted) and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987), found that a challenge to state bond and lien provisions used to "compel[] compliance with the judgments of [the state's] courts" was subject to *Younger*.

The central tenet underlying all of these *Younger* cases is a corollary of the non-interference principles underlying *Pullman* and *Burford*: Just as the federal courts should not unduly interfere with a state's administration of its own statutory and regulatory regimes, neither should the federal courts unduly interfere with a state's administration of its criminal and civil-enforcement mechanisms.

Against the backdrop of this overview of abstention law, it is clear that the Eighth Circuit's decision to abstain in this case outstripped the purposes of abstention doctrine. Abstention doctrine is about allowing states to interpret (*Pullman*) and administer (*Burford*) their statutory, regulatory, and enforcement (*Younger*) regimes without undue interference from the federal courts. Sprint's preemption challenge here is not about any aspect of how Iowa runs its internal affairs. It is a run-of-the-mill commercial dispute about the proper division of authority (under federal law) between the FCC and the states—and *that*, of course, is an entirely fitting question for a federal court to decide.

B. The Cases on Which the Eighth Circuit Relied Do Not Support Abstention Here.

Although Sprint's briefs to the Eighth Circuit analyzed more than a dozen of this Court's most significant abstention cases, the decision below contains remarkably little discussion of this Court's *Younger* precedents. Indeed, the decision cites *Younger* itself only *en passant*, Pet. App. 2a, and otherwise addresses and relies only on *NOPSI* and *Middlesex County*. Neither case supports the decision below.

1. *NOPSI*: As an initial matter, the decision below failed even to mention the most significant aspect of *NOPSI*: This Court in *NOPSI rejected* abstention under either *Younger* or *Burford*. The case accordingly does not support a broad abstention rule of the sort devised by the Eighth Circuit.

The circumstances of *NOPSI* were similar to this case. As here, *NOPSI* involved a claim that federal law preempted the decision of a state regulatory agency. Specifically, the claim was that a FERC order mandating that costs of planned nuclear reactors should be allocated to power companies in proportion to each company's share of overall demand preempted the New Orleans City Council's order denying a rate adjustment. *NOPSI*, 491 U.S. at 352-57. The Fifth Circuit affirmed abstention under both *Younger* and *Burford*, but this Court reversed.

In rejecting the argument for *Younger* abstention, the *NOPSI* Court began by describing the kinds of cases to which *Younger* does apply, noting that its "concern for comity and federalism has led [the Court] to expand the protection of *Younger* beyond state criminal prosecutions, to *civil enforcement*

proceedings ... and even to *civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions*." 491 U.S. at 367-68 (emphasis added). The Court plainly implied that these *Younger* categories of cases are all *judicial* in nature, because it contrasted them with "proceeding[s] reviewing legislative or executive action," as to which "it has never been suggested that *Younger* requires abstention." 491 U.S. at 368. The *NOPSI* Court then went on to hold that the Council proceedings at issue there were legislative, not judicial, and therefore not subject to *Younger*. 491 U.S. at 372-73.

The Eighth Circuit construed that discussion in *NOPSI* as indicating that *Younger* abstention applies in *all* cases arising from state-agency proceedings that are "judicial" in nature, rather than "executive" or "legislative." Pet. App. 8a-9a. But that is a clear misreading of *NOPSI*—it focuses on the Court's discussion of whether the Council proceedings there were "judicial" or "legislative," while ignoring the directly preceding discussion of the specific, limited categories of "judicial" cases to which *Younger* applies. Those categories—again, "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," 491 U.S. at 367-68—are clearly only a small subset of *all* judicial proceedings.

Perhaps the Eighth Circuit's confusion about *NOPSI* arose because the present case originated before a state agency. If this case had originated before a state trial court, it would obviously have been "judicial" in nature, since court proceedings are

by definition "judicial." But *Younger* plainly does not apply to state-court proceedings involving adjudication of everyday commercial disputes like the one underlying this case—such disputes have nothing in common with the *Younger* categories of criminal or civil enforcement cases set forth in *NOPSI*. And, of course, there is no reason to think that *Younger* should apply *more* broadly to review of state-agency proceedings than it does to court cases. If anything, it is an open question whether *Younger* applies *as* broadly to agency proceedings; while *NOPSI* was willing to "assume, without deciding," that it does, the Court also cautioned that it has only even "arguably appl[ied]" *Younger* to administrative proceedings twice. 491 U.S. at 369 & n.4.[7]

In sum, *NOPSI* indicates that it is *necessary* but not sufficient that state-agency proceedings be "judicial" rather than "legislative" in nature in order for *Younger* to apply. State agency action must also satisfy *NOPSI*'s earlier requirement that the proceedings be the *kind* of "judicial" action to which *Younger* would apply in an appeal from a state *court* decision—again, "state criminal prosecutions," "civil enforcement proceedings," or "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 367-68. The Eighth

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[7] Both cases, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), and *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), are discussed in detail below. In short, however, both cases—unlike this case—clearly fit into the *NOPSI* criminal and civil enforcement categories.

Circuit's contrary view that *Younger* applies to appeals of *all* state-agency adjudications finds no support in *NOPSI* and was reversible error.

2. *Middlesex County*: Apart from *NOPSI*, the only decision of this Court discussed by the Eighth Circuit is *Middlesex County*. According to the Eighth Circuit, that case held that "federal courts should exercise *Younger* abstention when":

> (1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges.

Pet. App. 5a.

This statement of the *Younger* rule is, however, incomplete. As Sprint argued below (and the IUB agreed[8]), the Eighth Circuit's three-pronged *Younger* standard would presumably be satisfied with respect to *every* state-agency proceeding (as long as an appeal is available, as is almost always the case)—particularly if, as the Eighth Circuit has held, the relevant "state interest" is "the importance of the generic proceedings" rather than the interests invoked in the particular case, Pet. App. 8a, and there is an "ongoing state judicial proceeding" any time that state appeals of administrative actions are available. *See* Pet. App. 4a. In other words, as a practical matter—barring "rogue" action by the IUB far beyond the authority granted to it under state law—the State of Iowa would *always* have a "substantial and legitimate interest in regulating its utilities" in *every* proceeding before the IUB.

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[8] Pet. at 13 & n.7.

The Ninth Circuit, which has articulated essentially the same three-pronged test under *Middlesex County* as the Eighth Circuit, *see Green v. City of Tucson*, 255 F.3d 1086, 1091 (9th Cir. 2001), *limited on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004), has acknowledged this problem with its test: "Read literally, [our] test could lead one to the conclusion that the plaintiffs in a state court proceeding who raise a federal issue may never file a parallel proceeding in federal court raising ,the same issue without running afoul of *Younger*." *Id.* at 1093. But, of course, the Ninth Circuit concluded, "[a] brief review ... of the *Younger* doctrine, beginning with *Younger* itself and culminating in *NOPSI*, makes clear that the *Younger* abstention doctrine does not reach so far." *Id.* at 1094. "As such, *Middlesex* provides an informative example of how care must be taken, in using a multi-factor analysis, to examine the context in which the analysis first was articulated." *Id.* at 1095.

The context of *Middlesex County* involved state-bar disciplinary proceedings. The source of what has become the *Middlesex County* test for *Younger* is the following passage from the case:

> The question in this case is threefold: *first*, do state bar disciplinary hearings ... constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

457 U.S. at 432. Given the context of *Middlesex County*, it was clear that the proceeding there *did* fall within the categories to which *Younger* can

apply, as later described by *NOPSI*. Specifically, while the disciplinary proceeding was not a "state criminal prosecution[]," it *was* a "civil enforcement proceeding[]." 491 U.S. at 367-68. Accordingly, unlike this case, there was no need for the Court to go beyond the "threefold" question it asked.

As further discussed directly below, however, in cases where the quasi-criminal nature of state enforcement action is *not* obvious, the coercion inquiry adopted by the vast majority of circuits serves to ensure that an administrative proceeding falls within the categories of cases described by *NOPSI* as potentially subject to *Younger*.

C. The "Coercion" Requirement Adopted by Nearly Every Circuit Properly Reflects this Court's *Younger* Jurisprudence.

The question presented in this case is whether the Eighth Circuit erred in declining to apply the requirement of "coercive" state action that most other circuits have adopted as part of their *Younger* analysis. The answer follows from the discussion of *NOPSI* and *Middlesex County* above. As *NOPSI* indicates, *Younger* applies only in certain kinds of cases that are akin to the criminal actions at the heart of the *Younger* doctrine—but the three-pronged *Middlesex County* test does not, on its face, impose such a limitation. The requirement of a state proceeding that is "coercive," as opposed to merely "remedial," harmonizes the limitations on *Younger* set forth in *NOPSI* with the *Middlesex County* standard.

The Tenth Circuit's opinion in *Brown ex rel. Brown v. Day*, 555 F.3d 882 (10th Cir. 2009), explains this point. The court began by setting forth

the three-pronged test, citing Tenth Circuit cases construing *Middlesex County*. *See* 555 F.3d at 888 (citing *Amanatullah v. Colorado Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999)) (internal quotation omitted). The court then explained, however, that consistent with *NOPSI*, it "must also decide whether [the] proceeding [there was] the *type* of state proceeding that is due the deference accorded by *Younger* abstention." *Brown ex rel. Brown*, 555 F.3d at 888 (quoting *NOPSI*, 491 U.S. at 369) ("Respondents' case for abstention still requires, however, that the *Council proceeding* be the sort of proceeding entitled to *Younger* treatment.") That analysis, the court held, should look first to "whether the federal plaintiff initiated the state proceeding of her own volition to right a wrong inflicted by the state (a remedial proceeding) or whether the state initiated the proceeding against her, making her participation mandatory (a coercive proceeding)." *Brown ex rel. Brown*, 555 F.3d at 889. The court also pointed out that "a common thread [in *Younger* analysis] appears to be that if the federal plaintiff has committed an alleged bad act, then the state proceeding initiated to punish the plaintiff is coercive." *Id.* at 891.

The Seventh Circuit's decision in *Majors v. Engelbrecht*, 149 F.3d 709, 712 (7th Cir. 1998), also addressed the relationship between the *Middlesex County* test for *Younger* abstention and *NOPSI*. According to the court there, under the first prong of the *Middlesex County* test—the requirement of an ongoing state judicial proceeding—"administrative proceedings are 'judicial in nature' when they are coercive—*i.e.*, state enforcement proceedings." Similarly, while the First Circuit quoted the

Middlesex County test in *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 518 (1st Cir. 2009), it also found that "remedial proceedings initiated by the plaintiffs are not of the type to which deference under *Younger* applies," but rather "proceedings must be coercive" to warrant abstention. *Id.* at 522.

This Court's decision in *Dayton* supports the remedial/coercive distinction. In *Dayton*, the Court clarified the line between state administrative proceedings to which abstention applies and those to which it does not. The *Dayton* Court distinguished this Court's earlier holding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), that a federal employment-discrimination claim could proceed without exhaustion of or deference to state administrative proceedings. Specifically, the *Dayton* Court found that *Younger does* apply to administrative action brought by a state agency to vindicate the State's policy against sex discrimination. The Court wrote:

> The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy v. Florida Board of Regents*, which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. Unlike *Patsy*, the administrative proceedings here are *coercive rather than remedial*, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton, 477 U.S. at 627 n.2 (emphasis added and citations omitted). As subsequent courts have recognized, "[t]he critical distinction" between

Dayton and *Patsy* was that *Dayton* involved a "coercive" proceeding, whereas *Patsy* did not. *See, e.g. O'Neill v. City of Philadelphia*, 32 F.3d 785, 791 n.13 (3d Cir. 1994).

The Eighth Circuit's decision below is thus not only inconsistent with the principles underlying *Younger* abstention, but also with this Court's specific distinction, in *Dayton*, of coercive state proceedings to which *Younger* applies from remedial proceedings where it does not. And nothing in *NOPSI* or *Middlesex County* requires adoption of the broad test adopted below, which would make abstention the rule rather than the exception in cases originating in state agencies.

III. THE EIGHTH CIRCUIT'S DECISION IMPROPERLY CONFLATED THIS COURT'S *BURFORD* AND *YOUNGER* ABSTENTION DOCTRINES.

Another way of understanding the Eighth Circuit's error is that the court thoroughly confused abstention law by conflating *Younger* and *Burford* into a new, impermissibly broad kind of abstention.

As discussed above, the *Burford* abstention cases permit the states to administer their regulatory regimes without undue interference from the federal courts. And the *Younger* cases prevent federal-court interference with state criminal and similar civil-enforcement regimes. At first blush, the present case falls far closer to the *Burford* line of cases than to the *Younger* cases. The state interests identified by the IUB in the district court—"enforcing the terms of telephone company tariffs and otherwise regulating the telephone companies" and the "protection of ...

citizens" who make phone calls in Iowa (*see* 8th Cir. J.A.248-249)—were closely related to the *Burford* policy of non-intervention in state regulatory affairs. The Eighth Circuit decision makes this point even more clearly, identifying no *Younger*-style enforcement interest, but only a "generic" interest in the "regulation of utilities." Pet. App. 7a-8a.

But the IUB did not even attempt to invoke *Burford* abstention below. And the reason it did not is simple—under the portion of *NOPSI* addressing *Burford* abstention, it is crystal clear that such abstention is not warranted in this case. As discussed *supra* at 24-25, *NOPSI* involved a claim that federal law preempted a decision of a state regulatory agency—specifically, that a FERC order requiring that the costs of planned nuclear reactors should be allocated to power companies in proportion to each company's share of overall demand preempted the New Orleans City Council's order denying a rate adjustment. *NOPSI*, 491 U.S. at 352-57. In reversing the lower courts' application of *Burford*, this Court observed that "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *Id.* at 362. The Court further explained that *Burford* simply does not apply to the types of facial-preemption argument at issue there:

> Here, NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied

> its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem[.]"

Id. (citation omitted).

In addition, the Court noted that "no inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially pre-empted by FERC's allocative decree," *id.* at 363, and emphasized that there is "'no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy,'" *id.* (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)); *see also GTE North, Inc. v. Strand*, 209 F.3d 909, 920-21 (6th Cir. 2000) ("Because Congress has invested the federal courts with primary responsibility for adjudicating [Federal Telecommunications Act] challenges to state telecommunications regulations, and because this case does not concern a disputed issue of state law, but rather a potential conflict between state and federal telecommunications laws, *Burford* abstention is inappropriate.") (citing *NOPSI*).

This Court's ruling in *NOPSI* is, of course, equally apropos in this case. The lower courts could have resolved the federal preemption arguments advanced by Sprint without any inquiry "beyond the four corners" of the IUB's order, and federal adjudication of that claim would not have disrupted Iowa's administration of its regulatory regime. Presumably, then, the IUB chose not to invoke

Burford because it was aware that this Court had stated—in a case very much like this one—that the *Burford* doctrine does not apply. Instead, the IUB convinced the Eighth Circuit to expand *Younger* beyond recognition in a case where the interests underlying *Burford* abstention are implicated but are not sufficient to warrant preemption.

In short, the Eighth Circuit's application of abstention in this case blurred the lines that this Court has drawn in its *Burford* and *Younger* cases in a way that makes no sense. This Court should correct the Eighth Circuit's confusing and overly expansive reading of *Younger*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In The Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, INC.,

Petitioner,

v.

ELIZABETH S. JACOBS, NICK WAGNER, AND SHEILA K. TIPTON, in their official capacities as Members of the Iowa Utilities Board,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Should the *Younger* abstention doctrine be narrowed to allow federal courts to enjoin state judicial proceedings that can be characterized as "remedial" but involve important state interests?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Agency Proceedings 1

B. Federal and State Court Proceedings 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. These State Proceedings Are Appropriate For *Younger* Abstention 10

A. Abstention is a well-recognized exception to the exercise of federal court jurisdiction 10

B. *Younger* abstention applies to this case 11

C. Sprint's reliance on *Verizon Maryland* is misplaced 18

D. The *Younger* abstention doctrine contains well-established limits that keep it within its proper bounds 20

II. Sprint's Proposed Coercive/Remedial Test is Supported by Neither Principle Nor Precedent 21

A. The coercive/remedial test sometimes produces the wrong result 23

B. Distinguishing between coercive and remedial proceedings can be difficult ... 26

TABLE OF CONTENTS – Continued

Page

C. Sprint's proposed test is, at best, a factor to be considered 29

III. In Any Event, The IUB Proceedings Were Coercive 29

IV. *Burford* Abstention Is Irrelevant To This Case 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Addiction Specialists, Inc. v. Township of Hampton, 411 F.3d 399 (3d Cir. 2005) 25

Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983) 15

Brown v. Day, 555 F.3d 882 (10th Cir. 2009) 26, 27, 31, 32, 33

Burford v. Sun Oil Co., 319 U.S. 315 (1943) ...9, 34, 35

Fisher v. Iowa Bd. of Opt. Exam'rs, 478 N.W.2d 609 (Iowa 1991) 3, 16

Gentlemen's Retreat, Inc. v. City of Philadelphia, 109 F.Supp.2d 374 (E.D.Pa. 2000) 28

Gibson v. Berryhill, 411 U.S. 564 (1973) 21

Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011) 22

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 11, 12, 13, 14, 23

Juidice v. Vail, 430 U.S. 327 (1977) 24

Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987) 27, 28

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986) 19

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) .....*passim*

Moore v. Sims, 442 U.S. 415 (1979) 26

TABLE OF AUTHORITIES – Continued

Page

Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996) 25, 26

Munn v. Illinois, 94 U.S. 113 (1877) 15

Nat'l Parks Cons. Ass'n v. Lower Prov. Tp., 608 F.Supp.2d 637 (E.D.Pa. 2009) 28

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) 10, 13, 14, 17

Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) 13, 22, 23

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 22, 23

Pennzoil Co. v. Texaco, 481 U.S.1 (1987) 23, 24

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) 21

ReMed Recovery Care Centers v. Township of Worcester, 1998 WL 437272 (E.D.Pa. July 30, 1998) 28

Steffel v. Thompson, 415 U.S. 452 (1974) 21

Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635 (2002) 18, 19

Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*

STATUTES

28 U.S.C. § 2283 10

47 U.S.C. § 152(b) 19

47 U.S.C. § 153(24) 3

TABLE OF AUTHORITIES – Continued

Page

47 U.S.C. § 153(53) 3

47 U.S.C. § 251 18

47 U.S.C. § 252 19

47 U.S.C. § 252(e)(6) 19, 21

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 18

Iowa Code § 17A.12 to 17A.17 14

Iowa Code § 17A.18A 1

Iowa Code § 17A.19 ..... 5, 14, 17

Iowa Code § 17A.20 14

Iowa Code § 476.3 1

Iowa Code § 476.5 ..... 2, 15, 33

Iowa Code § 476.51 ..... 15, 33

Iowa Code § 476.100 1

Iowa Code § 476.101 1

ADMINISTRATIVE RULES

199 Iowa Admin. Code 7.21 2

199 Iowa Admin. Code 22.14 ..... 2, 15

199 Iowa Admin. Code 22.14(1)(a) 33

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Connect America Fund, etc., WC Docket Nos. 10-90, *et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 4554 (Feb. 9, 2011) 4

Connect America Fund, etc., WC Docket Nos. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663 (Nov. 18, 2011), *appeal docketed, In re: FCC-11-161*, No. 11-9900 (10th Cir.) 4, 5

Exchange of Transit Traffic, "Order Affirming Proposed Decision And Order," 2002 WL 535299 (Iowa U.B. 2002).....3

Petition of UTEX Commun's Corporation, etc., 24 F.C.C.R. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 F.C.C.R. 14168 (Wir. Comp. Bur. 2010).....4

Qwest Corp. and U.S. Cellular Corp. v. East Buchanan Tel. Coop., 2004 WL 3369799 (Iowa U.B. 2004) 16

STATEMENT

A. Agency Proceedings

This case arises from a dispute before the Iowa Utilities Board ("IUB" or "Board") that threatened disruption of intrastate telephone service. Windstream (formerly known as Iowa Telecommunications Services, Inc.) is a local exchange carrier that delivers to its customers long distance calls made by Sprint's customers. After paying tariffed intrastate access charges to Windstream for some time without objection, Sprint stopped paying the charges based on its unilateral decision that VoIP calls were not subject to access charges. (Pet. App. 61a.) In response, Windstream notified Sprint that it intended to discontinue service to Sprint, disrupting service to Sprint's customers.

Sprint filed a complaint with the IUB alleging violations of Iowa Code §§ 17A.18A, 476.3, 476.100, and 476.101, and seeking emergency relief to prevent the disconnection. (Pet. App. 64a.) Sprint claimed that if Windstream blocked all calls placed by Sprint's customers to Windstream's customers, the action would be contrary to law and policy, as it would present an immediate danger to the public health, safety, or welfare by blocking emergency calls.

Windstream responded by declaring that it would not discontinue service to Sprint so long as Sprint remained current on newly-billed charges. Sprint then filed a motion to withdraw its complaint on the ground that the only relief it sought (an IUB order

prohibiting Windstream from discontinuing service) was no longer necessary. The IUB allowed Sprint to withdraw its complaint[1] but did not close the docket. Instead, recognizing the likelihood the dispute would recur, the IUB on its own motion "continue[d] the proceeding in order to give full consideration to the underlying dispute that resulted in the threatened disconnection." (Pet. App. 68a.)

The case before the IUB was about the application of state law to intrastate telecommunications calls, a matter within the jurisdiction of the IUB. The IUB's rules require that local exchange carriers, like Windstream, file tariffs for providing exchange access services to long distance carriers. 199 Iowa Admin. Code 22.14. Iowa law requires that public utilities and their customers abide by the terms of the tariffs filed with the IUB, without granting any customer any unreasonable preference, advantage, prejudice, or disadvantage. Iowa Code § 476.5. Windstream's intrastate access service tariff specifies the charges to be paid by long distance carriers to Windstream for carrying long distance calls over the local network to Windstream's customers. There was no dispute that Sprint was delivering intrastate long distance calls to Windstream for completion. In the absence of any other factors, state law required Sprint to pay

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[1] 199 Iowa Admin. Code 7.21 requires that complainants obtain IUB approval before a complaint may be withdrawn because of the possibility that the public interest will be implicated in any utility dispute.

Windstream for those access services, pursuant to the terms of the tariff.

Sprint raised a federal defense, however, claiming that the FCC had determined that the VoIP technology used to transmit the calls at issue converted the calls from a "telecommunications service" as defined in 47 U.S.C. § 153(53) to an "information service" as defined in § 153(24), to which intrastate access charges would not apply. The IUB necessarily considered that defense within the context of its state-mandated action.[2]

The Board concluded that the FCC had not declared that non-nomadic VoIP calls are an information service. The Board determined that these intrastate long-distance calls were subject to intrastate access charges because they were delivered to Windstream by a telecommunications carrier. Accordingly, the IUB found that Sprint's VoIP traffic was subject to Windstream's intrastate access tariff and Sprint had to pay the disputed charges pursuant to the state law provisions described above. (Pet. App. 144a-45a.)

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[2] State agencies in Iowa have the authority to consider federal preemption claims and to construe state law in light of federal constitutional issues. *Fisher v. Iowa Bd. of Opt. Exam'rs*, 478 N.W.2d 609, 612 (Iowa 1991). For example, the IUB has previously ruled that federal law removed certain mobile phone calls from the intrastate access charge regime. *See Exchange of Transit Traffic*, "Order Affirming Proposed Decision And Order," 2002 WL 535299 (Iowa U.B. 2002).

As Sprint acknowledges (J.A. 8a), the FCC had not classified VoIP as an information service at the time the IUB made its decision (and still has not done so). In fact, the FCC invited states to decide questions about the application of intercarrier compensation to calls made using VoIP technology.[3] Along with the IUB, other state public utility commissions were making decisions about the application of intrastate access charges to VoIP calling. (Pet. App. 118a-125a.)

Shortly after the IUB decision, the FCC confirmed it has not made any decisions about the regulatory classification of many types of VoIP calls, explicitly stating "the Commission thus far has not addressed the classification of interconnected VoIP services."[4] The reforms the FCC adopted in November 2011 apply prospectively only.[5] The FCC has not been persuaded "that all VoIP-PSTN traffic must be subject exclusively to federal regulation"[6] and still has

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[3] *Petition of UTEX Communications Corporation, etc.*, 24 F.C.C.R. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 F.C.C.R. 14168 (Wir. Comp. Bur. 2010).

[4] *Connect America Fund, etc.*, WC Docket Nos. 10-90, *et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 4554 (Feb. 9, 2011), ¶ 618, n. 935.

[5] *Connect America Fund, etc.*, WC Docket Nos. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663 (Nov. 18, 2011), ¶40, *appeal docketed, In re: FCC-11-161*, No. 11-9900 (10th Cir.) ("*USF/ICC Transformation Report and Order*").

[6] *USF/ICC Transformation Report and Order*, ¶934.

not classified interconnected VoIP as an information service.[7]

B. Federal and State Court Proceedings

After the IUB issued its decision, Sprint filed a complaint for declaratory and injunctive relief in federal district court asking the court to declare that the IUB decision is contrary to federal law and to enjoin the IUB members from enforcing the IUB orders. (J.A. 1a-9a.) Sprint asserted that state regulation of the VoIP service at issue is preempted, although Sprint admitted that the FCC had not ruled on whether VoIP is an information service. (J.A. 8a.) On the same day, Sprint also filed a petition in state district court seeking judicial review of the IUB's orders pursuant to Iowa Code § 17A.19. Sprint's state court petition includes its federal claim.

The IUB moved the federal court to abstain pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). The court granted the IUB's motion and dismissed Sprint's federal complaint, concluding that the requirements for *Younger* abstention were satisfied. (Pet. App. 11a.) Specifically, the district court found that the requested federal relief would unduly interfere with a state proceeding by enjoining the IUB from defending its order in the state proceedings. As such, "the requested injunctive relief against the IUB

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[7] *USF/ICC Transformation Report and Order*, ¶946, n. 1906.

is tantamount to an injunction against the state court proceeding." (Pet. App. 20a.) Further, the district court found that the state proceeding implicated important state interests because the IUB was engaged in judicial activity to regulate utilities in Iowa. The court also found an important state interest in the integrity of Iowa's procedure for judicial review of IUB orders. (Pet. App. 26a.) Finally, the court noted Sprint's agreement that the state proceedings afford Sprint an adequate opportunity to raise its federal questions. (Pet. App. 16a.)

Sprint appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the district court's decision to abstain, but vacated the decision to dismiss Sprint's federal complaint, remanding the case to the federal district court with instructions to enter a stay of the federal action. (Pet. App. 9a.)[8] The Eighth Circuit concluded that a federal court's declaration of how the IUB should interpret Iowa laws and regulations would interfere with pending state proceedings reviewing the same IUB interpretation. (Pet. App. 6a.) The Eighth Circuit found an important state interest in regulating and enforcing its intrastate utility rates. (Pet. App. 8a.) And again, Sprint's ability to raise its federal issues in the state proceeding was not

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[8] Sprint's brief incorrectly states that the Eighth Circuit concluded that Sprint's complaint should be dismissed. (Br. 16-17.) Sprint cites language from the district court's order and erroneously attributes it to the Eighth Circuit. (*Id.*)

contested. (Pet. App. 5a.) The court acknowledged Sprint's argument regarding the coercive or remedial nature of the state proceedings but concluded the distinction was not outcome-determinative. (Pet. App. 6a-7a.)

The state judicial review proceeding continues; briefing is complete and the case was argued before the state district court on April 19, 2013. The district court's ruling on the merits has not been issued as of the date this brief went to print.

SUMMARY OF ARGUMENT

This case involves an ongoing state proceeding involving two important state interests: Enforcement of Iowa law relating to public utility tariffs and protecting Iowans from harm resulting from a dispute between telecommunications carriers. The state proceeding offers a full opportunity for Sprint to present its federal law issues. When a state undertakes a judicial proceeding to serve important interests, the federal courts properly allow the state process to play out without interference. In those circumstances, *Younger* abstention is appropriate.

The authority to regulate the telecommunications industry is split between federal and state regulators and that split will inevitably result in cases that are on or near the line. Those few cases near the line do not mean that the states forfeit their legitimate interest in enforcing their laws and

protecting the public from injury. Instead, it is sometimes necessary for a regulator to investigate and determine how the jurisdictional divide applies to specific facts, as the IUB did.

Principles of comity and federalism require federal court deference to pending proceedings in which the state has a strong interest. Here, the IUB acted in its sovereign capacity on the state side of the federal-state divide, not as a deputized federal regulator. The agency conducted a state-law proceeding, coercive in nature, to address a potential harm to telephone customers in Iowa resulting from a potential violation of state law. Sprint raised a federal-law defense, requiring the IUB to determine whether the FCC had ruled that use of VoIP technology changes the jurisdictional nature of certain long distance calls, but this was still a proceeding involving important state interests. Under the *Younger* abstention doctrine, the case must be permitted to work its way through the state's process, where Sprint's federal claims can be given full consideration in the context of the state interests.

When considering *Younger* abstention in this matter, the Eighth Circuit correctly determined that the coercive or remedial nature of the related state proceeding does not, by itself, determine whether abstention is required. While the coercive/remedial distinction is an appropriate consideration in some cases, it does not reliably serve as a theory of definitive resolution and can produce inconsistent results,

making it a poor substitute for a complete *Middlesex County* analysis.

Furthermore, even if the coercive/remedial test were determinative, the proceedings before the IUB were coercive, not remedial, and therefore abstention was appropriate.

Finally, the Eighth Circuit's decision does not confuse or combine the *Burford* and *Younger* abstention doctrines. Sprint and the Law Professors argue that the IUB should have moved for abstention under *Burford*, then argue that *Burford* abstention does not apply. The IUB agrees that *Burford* abstention does not apply, albeit for a different reason. That is why the IUB did not rely upon, or even mention, *Burford* when it filed its motion for abstention. Instead, the IUB properly relied upon *Younger* abstention, and the Eighth Circuit did not confuse *Younger* and *Burford*.

ARGUMENT

The doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), requires that the federal courts abstain from enjoining the members of the IUB from defending and enforcing the IUB's decision. The doctrine's underlying principles, and a straightforward reading of this Court's decisions, confirms that it applies here. The Court should reject Sprint's effort to narrow the doctrine by allowing federal courts to enjoin ongoing state judicial proceedings that are deemed "remedial" in nature but involve important state interests.

I. These State Proceedings Are Appropriate For *Younger* Abstention.

A. Abstention is a well-recognized exception to the exercise of federal court jurisdiction.

Although the federal courts have a general obligation to decide cases properly brought before them, the abstention doctrines are a well-recognized exception to that obligation. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989). The history of the abstention exception is long and is based on foundational considerations of equity, comity, and federalism.

Under the common law, courts had discretion to withhold equitable forms of relief. That discretion predates the enactment of the statutes defining federal jurisdiction and those statutes preserve this traditional discretion. *Id.*; *see also* 28 U.S.C. § 2283 (the Anti-Injunction Act). Consistent with that common-law tradition, the Court has developed various abstention doctrines, the entire point of which is to identify the situations in which federal courts should decline to exercise their jurisdiction in favor of a state proceeding. The *Younger* doctrine, at issue here, is a cornerstone of that effort.

In *Younger*, the Court determined that long-standing judicial policy requires that federal courts refrain from interfering with pending state criminal proceedings, identifying equity, comity, and federalism as the sources of this policy. As *Younger* explains,

equitable principles prevent duplication of legal proceedings when a single suit is adequate to protect the rights asserted. 401 U.S. at 44. Principles of comity, in contrast, preserve respect for state functions, recognizing that the country is made up of a union of separate state governments and their institutions. The exercise of comity eases the potential friction or tension between the federal and state courts. When comparing comity to the equitable principles described above, the Court declared that comity is the "even more vital consideration." *Id.*

The *Younger* Court also recognized the related notion of federalism, which allows the states to pursue their own policies to the benefit of the nation as a whole, which also supports abstention in appropriate cases. *Id.* Thus, even when federal rights and interests are at issue, if the state proceedings are capable of protecting those federal rights and interests, it is "perfectly natural" and "normal" for the national government not to interfere in the legitimate activities of the states. 401 U.S. at 45.

B. *Younger* abstention applies to this case.

Younger principles of comity and federalism apply to state civil proceedings involving important state interests. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). They also apply to pending state administrative proceedings that are judicial in nature, so long as the federal plaintiff has a full and fair opportunity to present any constitutional claims. *Middlesex County*

Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982). Together, these cases establish that *Younger* abstention is fully applicable to civil administrative proceedings such as the case before the IUB.

1. The *Huffman* Court concluded that federal restraint is appropriate in civil proceedings because the comity and federal interests underlying the *Younger* doctrine fully apply to civil proceedings where important state interests are involved; federal interference would prevent the state from pursuing its own policies and would deny the state the ability to first consider any constitutional objections. 420 U.S. at 604. As sovereign entities, states should be permitted the initial opportunity to consider those objections, giving the opportunity to take such action as may be necessary in order to obviate the objections and make further constitutional analysis unnecessary.

The *Huffman* Court also recognized that federal interference in ongoing state cases could result in duplicative legal proceedings, which (a) could be seen to impugn the Iowa courts' ability to protect constitutional rights by presenting the appearance of a lack of confidence in the state courts and (b) to be an inefficient use of legal resources. 420 U.S. at 604. Sprint's approach to this case reflects an apparent lack of confidence in the state system and has already resulted in unnecessary legal proceedings, as Sprint seeks to present its claims in a repetitive manner; first its federal claim in federal court and then its state claims in state court, all while the state court

system is capable of hearing and deciding all of the issues in a single appellate process.

2. While *Huffman* involved state civil court proceedings, *Middlesex County* applied *Younger* abstention to state administrative proceedings, more specifically to a state proceeding that was initially conducted by a local District Ethics Committee, subject to judicial review. The Court concluded that the state bar disciplinary proceedings warranted federal court deference because they were "judicial in nature." 457 U.S. at 433-34. And in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), the Court reaffirmed that *Younger* applies to state administrative proceedings that are judicial in nature.

The *Middlesex County* Court set out a three-part test for determining when *Younger* abstention is required: (1) Is there an ongoing state judicial proceeding? (2) Do the proceedings implicate important state interests? (3) Is there an adequate opportunity in the state proceedings to raise constitutional challenges? 457 U.S. at 432. If all three questions are answered in the affirmative, then a federal court should abstain, absent "bad faith, harassment, or some extraordinary circumstance that would make abstention inappropriate." *Id.* at 435. Here, all three of these questions are answered affirmatively.

First, there is an ongoing state judicial proceeding. In *NOPSI*, this Court left open the question of whether there is an ongoing state proceeding where a

state agency issues a ruling that is, or could be, appealed to a state court. 491 U.S. at 369. Sprint did not seek certiorari on that issue, however, so it is not properly before the Court. The Court should therefore assume, as it did in *NOPSI*, that the availability of state court review provides an ongoing state proceeding.

In all events, the Eighth Circuit was on solid ground in concluding there is an ongoing state proceeding here. Just as *Younger* applies when state trial court proceedings are ended (*Huffman*, 420 U.S. at 608-09), *Younger* applies after a state administrative proceeding of a judicial nature is ended, based upon the same *Huffman* considerations of judicial efficiency, comity, and federalism.

Federal intervention after the agency proceedings are concluded would be duplicative because the IUB has already offered Sprint an opportunity for a hearing with the full panoply of procedural rights available in a trial court. Iowa Code §§ 17A.12 to 17A.17. Further, the Iowa appellate courts are charged by statute with the duty to review state agency decisions, including those that involve constitutional questions, to ensure those decisions conform to certain standards. Iowa Code §§ 17A.19 to 17A.20. That function would be annulled if exhaustion of state appellate remedies is not required once there has been significant progress at the agency level.

But, again, that issue is not properly before the Court.

Second, the IUB proceedings involve an important state interest. Regulation of utilities has long been recognized as "one of the most important functions traditionally associated with the police power of the State." *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377 (1983), citing *Munn v. Illinois*, 94 U.S. 113 (1877). The IUB was engaged in reviewing the conduct of two telecommunications carriers with the specific goals of (a) enforcing state law and (b) protecting the public from the injuries that would result if important telephone calls were interrupted due to a commercial dispute between the carriers. Specifically, 199 Iowa Admin. Code 22.14 requires Windstream to charge carriers like Sprint for providing access services, pursuant to tariff, and Iowa Code § 476.5 prohibits public utilities from charging more or less than the tariffed rate for utility services. A violation of the statute or an IUB rule or order may subject the utility to civil penalties pursuant to Iowa Code § 476.51, after notice and opportunity for hearing. The state has an important interest in preserving this regulatory scheme.

The state also has an important interest in protecting its citizens from disruption of important telephone calls due to a dispute between telecommunications carriers. In fact, in its complaint filed with the IUB, Sprint alleged that "blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or

welfare."[9] Thus, Sprint acknowledges that the public interest in completing telephone calls is an important matter of law and policy, *i.e.*, that it is an important state interest. While that interest was temporarily addressed when Windstream agreed not to disconnect Sprint under certain conditions, the parties acknowledged the call blocking dispute was likely to recur (Pet. App. 66a), so the state's interest was still at issue.

Third, the IUB proceedings offer an opportunity to consider Sprint's constitutional challenges. Sprint has not challenged the third of the *Middlesex County* factors, but it is worth noting that the proceedings before the IUB offered an opportunity for the agency to consider Sprint's federal law defense and the ongoing judicial review proceedings provide a full and fair opportunity to present those claims in state court. Under Iowa law, constitutional claims involving state administrative proceedings must be raised before the state agency in order to be preserved for judicial review. *Fisher*, 478 N.W.2d at 612. This requirement provides the agency an opportunity to construe its enabling legislation in light of the constitutional allegations.

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[9] Sprint was quoting from the IUB's decision in *Qwest Corp. and U.S. Cellular Corp. v. East Buchanan Tel. Coop.*, 2004 WL 3369799 (Iowa U.B. 2004). Sprint's complaint in the IUB proceedings can be found at: https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mdu0/~edisp/030034.pdf.

Even if the state agency lacked authority to consider such arguments on its own (which it does not), it is sufficient under *Middlesex County* that Sprint's constitutional claims can be presented in state court appellate review. 457 U.S. at 436. Iowa Code § 17A.19 provides that opportunity.

Finally, *NOPSI* added a fourth step to the *Middlesex County* analysis, requiring consideration of whether the agency proceeding was "the type of proceeding to which *Younger* applies," distinguishing between state judicial inquiries and state action of a legislative nature. 491 U.S. at 367. Only proceedings of a judicial nature are entitled to *Younger* abstention. *Id.* Unlike *NOPSI*, where the agency was engaged in setting utility rates prospectively, the IUB sought to enforce the status quo that existed before Sprint ceased paying intrastate access charges to Windstream. The IUB's order enforced liabilities based on present facts and existing laws, and thus the agency proceeding constituted a judicial proceeding that is entitled to *Younger* abstention.

Sprint and the *amici curiae* Law Professors ignore this fundamental difference between *NOPSI* and this case: In *NOPSI*, the state was engaged in ratemaking for the future, a legislative act, while the IUB was engaged in ***enforcing rates that had already been set***, a judicial act. In abstaining here, the lower courts faithfully applied *NOPSI* and this Court's other *Younger* precedents.

C. Sprint's reliance on *Verizon Maryland* is misplaced.

In an attempt to avoid the application of *Middlesex County* to these proceedings, Sprint relies on *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635 (2002), as authority for the ability of federal courts to review state utility commission orders that are issued pursuant to the Telecommunications Act of 1996 ("1996 Act"). (Br. 14-16.) The CTIA does likewise. (CTIA Br. 13-16.) *Verizon Maryland* is irrelevant to this case, however, because *Verizon Maryland* is not an abstention case and because the IUB's orders were not issued pursuant to the 1996 Act.

Neither *Younger* nor any other abstention doctrine is mentioned even once in *Verizon Maryland*. Instead, the central question in *Verizon Maryland* was whether the federal court had jurisdiction to review a state commission decision involving the interpretation of an interconnection agreement entered into pursuant to federal law. The IUB has not challenged the federal court's jurisdiction in this matter; rather, the question the IUB presented was whether the federal court should decline to exercise that jurisdiction based upon *Younger*, a question not present in *Verizon Maryland*.

Furthermore, *Verizon Maryland* involved a state commission acting pursuant to a delegation of federal authority. Specifically, 47 U.S.C. § 251 requires that incumbent local exchange carriers interconnect with

and share their networks with competitors pursuant to interconnection agreements. 47 U.S.C. § 252 then requires that state commissions review and approve negotiated agreements and, when necessary, arbitrate agreements when negotiations are unsuccessful. Because the state commissions are operating under delegated federal authority, their actions are subject to review in federal district court under 47 U.S.C. § 252(e)(6).

Here, in contrast, federal law explicitly reserves the subject matter of the IUB proceedings to the states. States have primary authority over intrastate services. 47 U.S.C. § 152(b). In the absence of a specific Congressional directive, there is no intrastate FCC authority. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986). There is no such directive here.

The case before the IUB involved the question of whether intrastate exchange access charges applied to long distance calls made using VoIP technology. The IUB was acting pursuant to state law and state authority; it was not acting "in the voluntarily assumed capacity of a federal regulator" (CTIA Br. 33) or as a "deputized federal regulator" (Pet. Br. 13), as the Maryland commission was. *Verizon Maryland* is irrelevant to this case.

D. The *Younger* abstention doctrine contains well-established limits that keep it within its proper bounds.

In the end, Sprint's position comes down to the assertion that a straightforward application of the *Middlesex County* standard is overbroad and "would presumably be satisfied with respect to *every* state-agency proceeding." (Br. 27, emph. in original.) Other *amici* make the same claim of overbreadth. (Chamber Br. 12, CTIA Br. 33-35.) However, there are well-established limits on the application of *Younger* abstention that prevent the overbroad application of abstention described by Sprint and the others.[10]

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[10] Sprint asserts that at oral argument before the Eighth Circuit the IUB "boldly proclaimed that *Younger* abstention applies to *all* of its proceedings regardless of the legal regime involved – *i.e.*, that review of IUB decisions is available only through the state court system." (Br. 10, emphasis in original, footnote omitted.) Sprint's only support for this incorrect statement is that the IUB did not explicitly deny it at the certiorari stage of this matter. (*Id.*, n. 5.)

Because the Eighth Circuit's recording equipment malfunctioned during argument, there is no direct record of what was said. At the certiorari stage, Sprint relied on this absence of evidence to attribute certain statements to the IUB. (Pet. 13.) In the absence of a recording, the IUB chose not to engage in fruitless "he said, she said" argument and instead focused on the evidence in the record, that is, the written statements in the IUB's brief. (BIO 12.) Sprint continues to ignore this written record. The IUB does not now and never has asserted that *Younger* abstention applies to all IUB proceedings. The limits of *Younger* abstention are well-defined and apply to the IUB.

Younger abstention does not apply when the state administrative proceedings are legislative in nature, rather than judicial, NOPSI, 491 U.S. at 372, or in the absence of a prior pending state proceeding. *Steffel v. Thompson,* 415 U.S. 452, 474 (1974). Abstention is not available if the plaintiff is seeking something other than equitable or other discretionary relief. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719 (1996). Judicial bias is a recognized basis for denying *Younger* abstention. *Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). *Younger* abstention does not apply when Congress has declared that state action in specific circumstances should be reviewed in federal court, such as in 47 U.S.C. § 252(e)(6). Finally, abstention is unavailable if any one of the three *Middlesex County* factors is not present.

These are substantial limitations on the *Younger* abstention doctrine. They serve to identify the state proceedings in which comity and federalism require a federal court to stay its hand by focusing on proceedings that are judicial in nature, involve important state interests, and offer adequate opportunity to address federal issues. The case before the IUB satisfies all three of those requirements.

II. Sprint's Proposed Coercive/Remedial Test Is Supported by Neither Principle Nor Precedent.

The coercive/remedial test proposed by Sprint, if adopted, would inevitably result in federal courts

failing to abstain in cases where the state proceedings can be characterized as remedial but nonetheless involve an important state interest. Such a result is not required by principle or by precedent. There may be some attractiveness to a simple "bright-line" test for determining whether to abstain; simple tests that can replace a complex analysis can aid in the efficient administration of justice. However, a good bright-line test must give the right result and be easy to apply. The coercive/remedial distinction can produce incorrect results and can be difficult to apply. For these reasons, the Eighth Circuit correctly concluded that the test should not be considered outcome-determinative in all cases. *Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011).

Hudson acknowledges that other circuits recognize a distinction between coercive and remedial actions. That distinction is based upon four words from a footnote in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, n. 2 (1986). However, there is nothing in that footnote to indicate that the distinction was intended to become the final touchstone for determining whether *Younger* abstention is required; the *Dayton* Court merely distinguished an earlier decision by saying that "[u]nlike *Patsy*,[11] the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took

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[11] *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

place, and involve an important state interest." *Id.*, n. 2 (footnote added). The coercive/remedial distinction was only one of three different factors identified by the Court as distinguishing *Dayton* from *Patsy*, a slender thread by which to hang an outcome-determinative test, especially one that sometimes produces wrong results.

A. The coercive/remedial test sometimes produces the wrong result.

The coercive/remedial test cannot be reconciled with this Court's holding in *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987), "that *Younger* requires a district court to abstain from intervening in a state proceeding between two private parties." *Hudson*, 663 F.3d at 987-88. *Pennzoil* involved two private litigants in both the state and federal cases; the State of Texas was not a party litigant to either proceeding, so the state proceedings cannot be characterized as "coercive" under any of the tests currently in use. Nonetheless, the *Pennzoil* Court concluded that the federal district court "should have abstained under the principles of federalism enunciated in *Younger* . . . ," 481 U.S. at 10, because "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand." *Id.* at 14. There is no way to reconcile a bright-line test based upon the coercive/remedial distinction with the result in *Pennzoil*.

Similarly, the proposed coercive/remedial test is inconsistent with the result in *Juidice v. Vail*, 430 U.S. 327 (1977), where the Court required *Younger* abstention in a civil lawsuit brought by judgment creditors in an attempt to collect judgment. 430 U.S. at 337. Again, the state was not a party litigant to the proceeding, so the case cannot be called coercive, yet abstention was still required.

Sprint tries to explain this inconsistency by describing *Pennzoil* and *Juidice* as being in a special class of civil proceedings that further the state courts' ability to perform their judicial functions. (Br. 22.) While that description of the cases is accurate, it ignores the ***rationale*** of the decisions, which is not limited to that special class. In *Juidice*, the Court emphasized that the most important reason for nonintervention is comity, "a proper respect for state functions." 430 U.S. at 334. *Pennzoil* also turns on the strong policy of comity, with an emphasis on the state's interest in a particular regulatory matter; if that interest is "so important that exercise of the federal judicial power would disregard the comity between the States and the National Government," abstention is required. 481 U.S. at 11. The key factor in both *Pennzoil* and *Juidice* is not as limited as Sprint asserts; both cases were decided on the basis of comity. The fact that *Pennzoil* and *Juidice* had similar types of state interest at stake does not mean abstention is limited to those particular types of state interest. If there is a sufficiently important state interest, comity requires abstention.

Using the coercive/remedial distinction as a binding test would also be inconsistent with the decision in *Middlesex County*, which recognized that abstention is required in criminal proceedings (clearly coercive) but also in "[p]roceedings necessary for the vindication of important state policies. . . ." 457 U.S. at 432. A state may be called upon to defend its policies in a proceeding regardless of who initiated it; thus, many remedial proceedings may involve important state policies that justify abstention under *Middlesex County*.

Nor, contrary to Sprint's contention, is the Eighth Circuit alone in requiring *Younger* abstention in situations where the state proceedings would be classified as remedial. For example, in *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3d Cir. 2005), the state proceedings would be characterized as remedial (because the plaintiff initiated the challenge to a zoning decision and there was no state enforcement proceeding), but the Third Circuit affirmed the district court's decision to abstain without discussing the coercive/remedial distinction. Instead, the court applied the standard *Middlesex County* three-part analysis and concluded *Younger* abstention was appropriate. 411 F.3d at 408-11.

Similarly, in *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996), the circuit panel ordered abstention *sua sponte* in a case where the underlying proceedings must be characterized as remedial, not coercive. *Morrow* involved private litigation in the form of a

state adoption proceeding; neither the state nor any of its agencies was a party. 94 F.3d at 1396-97. The appellate court nonetheless found *Younger* abstention was required due to the importance of the state's interest in family relations, relying upon *Moore v. Sims*, 442 U.S. 415, 435 (1979). The *Morrow* court concluded there was no need for federal litigation of issues already under consideration in the ongoing state proceedings. 94 F.3d at 1397.

Each of these cases demonstrates that it is possible, even inevitable, to have "remedial" cases that nonetheless require *Younger* abstention due to the importance of the state interest involved. The simple test proposed by Sprint would produce incorrect results in many cases.

B. Distinguishing between coercive and remedial proceedings can be difficult.

The rule proposed by Sprint should also be rejected because the line between a coercive and a remedial proceeding is not at all precise. For example, the panel in *Brown v. Day*, 555 F.3d 882 (10th Cir. 2009), split over the apparently simple question of whether the Medicaid administrative proceeding involved in that case was coercive or remedial.

The *Brown* majority concluded the state agency proceedings were remedial, rather than coercive, because (a) Brown initiated the challenge to actions by the Kansas state agency and (b) Brown "committed no cognizable bad act." 555 F.3d at 893. In

contrast, the *Brown* dissent considered the same facts and concluded the proceedings were coercive because under Kansas law, "Brown was an unlawful recipient of Medicaid benefits, and the state was acting in its enforcement role during Brown's administrative proceedings." 555 F.3d at 897. Thus, the dissent considered the state's notice of termination of benefits to be the beginning of the state's judicial process, while the majority viewed the federal plaintiff's request for hearing as the initiating act, all based upon consideration of the same set of undisputed adjudicative facts.

The First Circuit experienced a similar split in *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987), in which the federal plaintiff was fired from her position as school district superintendent for allegedly unconstitutional reasons. The Secretary of Public Instruction served the plaintiff with an order dismissing her from employment and notifying her of her right to file an administrative appeal. Instead, she filed an action in the federal court, which found the charges against her to be without merit and reinstated her. On appeal, the Secretary argued the district court should have abstained under *Younger*. The majority disagreed, concluding the administrative proceedings were remedial in nature, in part because in the majority view the issuance of the dismissal order, by itself, constituted a legal wrong. 829 F.2d at 261. Because the wrong was complete when the dismissal order was issued, and the plaintiff merely had the option of initiating further state

proceedings to try to remedy the wrong, there was no ongoing state proceeding and abstention was not required. *Id.*

The dissent took a different view, observing that when the plaintiff brought her federal suit, she was "very much in the midst of Commonwealth administrative proceedings." 829 F.2d at 267 (Breyer, J., dissenting). This was because the dismissal order, by its own terms, became final only if it was not appealed within the state system within ten days. *Id.* Thus, sending the notice was just one step within "an integrated, statutory administrative scheme" and, therefore, the state proceeding was still pending. *Id.* Again, this case demonstrates that the coercive/remedial distinction can be anything but easy to apply.

Other cases also demonstrate the malleability of this distinction. For example, in two cases before courts in the same district, just two years apart, one court found a cease and desist action in the zoning context to be "coercive" while the other court considered the same action to be "remedial." *See ReMed Recovery Care Centers v. Township of Worcester,* 1998 WL 437272 (E.D.Pa. July 30, 1998), and *Gentlemen's Retreat, Inc. v. City of Philadelphia*, 109 F.Supp.2d 374 (E.D.Pa. 2000). *See also Nat'l Parks Cons. Ass'n v. Lower Prov. Tp.*, 608 F.Supp.2d 637, 652-56 (E.D.Pa. 2009) (explaining the difficulties of applying the coercive/remedial test). A good bright-line test should not be so difficult to apply or produce such inconsistent results.

C. Sprint's proposed test is, at best, a factor to be considered.

The coercive/remedial distinction may be useful in some cases as a factor in making the decision whether to abstain, but as shown above it should not be considered a standalone, controlling test for determining whether abstention is required. The distinction can help in evaluating the state's interest in an administrative proceeding, as coercive cases are always likely to involve an important state interest, while some remedial cases may not. The distinction can also aid in the analysis of *Middlesex County's* third prong, as well; a coercive proceeding that is judicial in nature is likely to provide an adequate forum to consider the federal issues in connection with the important state interests. So, while the distinction is not appropriate for use as a bright-line test, it may still have value as a consideration.

III. In Any Event, The IUB Proceedings Were Coercive.

Sprint's argument is premised on the proposition that the IUB proceedings were remedial, not coercive. That is so, according to Sprint and its *amici*, because the proceedings were initiated by Sprint. (Sprint Br. 29, Chamber Br. 6 n. 2, and Law Professors Br. 27.) Upon closer inspection, however, Sprint's assumption is unfounded. If the coercive/remedial distinction were applied as a test in this case – and it should not be for all the reasons discussed above – the Eighth Circuit decision would still merit affirmance. And the

very difficulty of characterizing these proceedings highlights the difficulties in implementing Sprint's proposed test.

It is perhaps for that reason that the Eighth Circuit did not make a determination regarding the coercive or remedial nature of the IUB proceedings. The Eighth Circuit acknowledged Sprint's contention that the state proceedings are remedial but did not state whether it agreed with Sprint's characterization. Instead, the court simply noted that it recognized the distinction but has "not considered the distinction to be outcome determinative." (Pet. App. 6a-7a.)

To apply the test, it is first necessary to determine what the terms mean. After considering the definitions used by the other circuits, the Tenth Circuit adopted the following multi-factor analysis, which Sprint cited approvingly (Br. 30):

> First, we must query whether the federal plaintiff initiated the state proceeding of her own volition to right a wrong inflicted by the state (a remedial proceeding) or whether the state initiated the proceeding against her, making her participation mandatory (a coercive proceeding). Second, we must differentiate cases where the federal plaintiff contends that the state proceeding is unlawful (coercive) from cases where the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial). Even this test is not entirely determinative; below, we also discuss

> other factors that may distinguish remedial proceedings from coercive ones.

Brown, 555 F.3d at 889. The "other factors" mentioned in the quote include whether "the federal plaintiff has committed an alleged bad act" (555 F.3d at 891) and whether the proceeding "originated with the state's proactive enforcement of its laws" (555 F.3d at 892), each of which indicates a coercive proceeding.

Under the *Brown* test, the proceedings before the IUB were coercive. This is even true under the "who-filed-first" test. Sprint filed a "Complaint and Request for Emergency Relief" with the IUB on January 6, 2010, but that is not the end of the story. Sprint subsequently withdrew its complaint and attempted to terminate the proceeding, but the IUB issued an order recasting the proceeding and requiring Sprint to continue to participate, effectively re-initiating the proceeding as described in greater detail in the Statement, *supra* pp. 1-2. The IUB stepped in to enforce state law and to protect important state interests. Under the who-filed-first test, the IUB proceedings were coercive because the IUB initiated the enforcement proceedings.

Even though this simplest definition of "coercive" favors the IUB in this case, the who-filed-first test should not be considered determinative of whether a proceeding is coercive or remedial. If the distinction is intended to help identify cases involving an important state interest, then applying it as an

outcome-determinative test could have led to the wrong conclusion in this matter. While the case before the IUB may have appeared to be a private dispute prior to being recast, the fact is that ***this case involved an important state interest from the moment it was initiated by Sprint***. The IUB's initial concern was that telecommunications customers in Iowa should not be harmed by the blocking of their important telephone calls due to a dispute between two carriers, because some percentage of those calls will be emergency calls to doctors, parents, schools, and others; the public interest requires that such calls not be used as leverage in intercarrier disputes. That interest was present when Sprint filed its complaint; it was present when the IUB allowed Sprint to withdraw its complaint; and it was present when the IUB recast the proceedings and required that they continue. If Sprint had never moved to withdraw its complaint, that public interest factor in the IUB proceedings still would have been present. The procedural history of this case reveals the unreliable nature of the who-filed-first test, showing that an apparently remedial case can still be appropriate for *Younger* abstention.

An examination of the other tests from the Tenth Circuit's analysis is also illuminating. The first factor is whether the case is one "where the federal plaintiff contends that the state proceeding is unlawful (coercive) [or one] where the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial)." *Brown*, 555 F.3d at 889. Sprint originally sought

a remedy preventing disconnection by a non-state actor and did not claim any "state-inflicted wrong." In its various appeals of the IUB decision, Sprint contends the IUB's proceedings were unlawful under federal law. Sprint does not seek a ***remedy*** from the state for some alleged state-inflicted wrong like unlawful termination of Medicare benefits or employment. Under this test, the IUB proceedings were coercive.

The Tenth Circuit also considers whether it has been alleged that the federal plaintiff has committed a bad act. *Brown*, 555 F.3d at 891. In the proceedings before the IUB, Windstream alleged that Sprint had wrongfully withheld intrastate access charge payments, in violation of Iowa Code § 476.5 and 199 Iowa Admin. Code 22.14(1)(a). (Pet. App. 71a.) The IUB proceedings therefore involved an allegation that Sprint had violated state statutes and regulations, that is, Sprint had committed a bad act. Under this test as well, the IUB proceedings were coercive.

The final Tenth Circuit consideration is whether the state administrative proceedings "originated with the state's proactive enforcement of its laws." *Brown*, 555 F.3d at 892. Again, the circumstances of this case demonstrate that this test is satisfied. The IUB recast the proceeding to determine whether Sprint had violated Iowa law by failing to pay tariffed intrastate access charges, and if so, to order Sprint to pay those charges. Failure to comply with such an IUB order could have resulted in the imposition of civil penalties pursuant to Iowa Code § 476.51.

When the coercive or remedial nature of the case is properly considered in the abstention analysis as a factor indicative of the presence of a substantial state interest, it is clear that under any of the tests in use that the proceedings before the IUB were coercive, not remedial.

IV. *Burford* Abstention Is Irrelevant To This Case.

Sprint and the Law Professors set up a *Burford*[12] straw man only to knock it down, arguing that the IUB should have moved for abstention under that doctrine, and then arguing that *Burford* abstention does not apply to this case. The IUB agrees that the doctrine does not apply here; that is why the IUB did not move for abstention under *Burford*.

Burford involved a complex system of state regulation that required a state agency and the state courts to participate as partners in the formation of policy and determination of cases involving oil production rights. 319 U.S. at 333. Intervention by lower federal courts in that system had already resulted in confusion and conflict. *Id.* at 327. "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand." *Id.* at 334.

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[12] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

This case involves no such complex system. There is no partnership between the IUB and the Iowa courts to develop policy and decide cases. The issues before the IUB involved straightforward tariff interpretation, akin to contract interpretation, and a determination of whether the FCC has declared VoIP calls to be an information service. This case is not like *Burford*.

Younger is the proper abstention doctrine for this case, as described in the three-part test of *Middlesex County*. There can be no real dispute that there is an ongoing state proceeding; Sprint sought judicial review of the IUB decision in state court. The proceedings implicate important state interests in the regulation of public utilities in Iowa, the enforcement of Iowa laws, the protection of Iowa consumers, and the interest of state courts in reviewing the decisions of administrative agencies. Finally, there is no dispute that Sprint can present all of its argument, federal and state, in the state court proceedings. This is the type of case to which *Younger* abstention applies.

The Eighth Circuit did not confuse *Younger* and *Burford*. It did not even mention *Burford*. The Eighth Circuit ignored *Burford* because it is not relevant here.

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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August 27, 2013

REPLY BRIEF

RECORD
AND
BRIEFS

SEP 26 2013

No. 12-815

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit**

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY 1

ARGUMENT 3

I. THE IUB SEEKS TO DRAMATICALLY EXPAND THE SCOPE OF *YOUNGER* ABSTENTION. 3

A. *Younger* Abstention is the Exception, Not the Rule. 4

B. The IUB's Application of *Younger* Abstention Lacks Meaningful Limiting Principles. 5

C. The Cases on Which the IUB Relies Do Not Support Abstention Here. 10

II. THE COERCIVE/REMEDIAL DISTINCTION IS CONSISTENT WITH THIS COURT'S *YOUNGER* CASES 16

III. SPRINT'S STATE-COURT PETITION FOR REVIEW OF THE IUB'S DECISION WAS NOT A COERCIVE STATE ACTION 19

IV. THE IUB'S SUGGESTIONS THAT THIS CASE INVOLVES PRIMARILY STATE-LAW ISSUES ARE WRONG. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Alleghany Corp. v. McCartney,
896 F.2d 1138 (8th Cir. 1990) 12, 19

AT&T Corp. v. Iowa Utils. Bd.,
525 U.S. 366 (1999) 21-22

Brown ex rel. Brown v. Day,
555 F.3d 882 (10th Cir. 2009) 6

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 3, 9, 21

Chaulk Servs., Inc. v. Mass. Comm'n Against Discrimination, 70 F.3d 1361 (1st Cir. 1995) 5

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 9, 24

Connect Am. Fund, Report and Order and Further Notice of Proposed Rulemaking,
26 FCC Rcd. 17,663 (2011) 22-23

England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) 3-5, 10

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 19

Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001), *limited on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) 6

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 2, 11-14

Juidice v. Vail, 430 U.S. 327 (1977) 2, 11, 13-15

Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) ..... *passim*

New Orleans Pub. Serv., Inc. v. City of New Orleans, 798 F.2d 858 (5th Cir. 1986) 21

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 2, 4-6, 10-19, 21

Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986) 18

Patsy v. Bd. of Regents of Fla., 457 U.S. 496 (1982) 18

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 2, 11, 13-17

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) 8-9

Sprint Commc'ns Co., L.P. v. Iowa Utils. Bd., Case No. CVCV008638, slip op. (Iowa Dist. Ct. Sept. 16, 2013) 17

Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250 (S.D.N.Y. 1986) 15

Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. Ct. App. 1987) 14

Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*

Statutes and Other Legislative Authorities

Ohio Rev. Code Ann. § 3767.01 *et seq.* (1971) 11

47 U.S.C. § 152(b) 21-22

47 U.S.C. § 251(b)(5) 22

47 U.S.C. § 251(g) 22

Other Authorities

Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L. J. 71 (1984) 4

George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking* Younger *Abstention*, 59 Geo. Wash. L. Rev. 114 (1990) 4

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION AND SUMMARY

Sprint's opening brief demonstrated that the Eighth Circuit's decision is inconsistent with this Court's jurisprudence establishing the primacy of the federal judiciary in deciding questions of federal law and inconsistent with the purposes of abstention. The abstention doctrine is intended to permit states to interpret and administer state statutory, regulatory, and enforcement regimes without undue interference from the federal courts. But this case does not implicate those concerns—it is a commercial dispute about the proper division of authority under *federal* law between the FCC and the states.

In urging application of *Younger* abstention here, the IUB seeks to dramatically expand the doctrine, transforming a narrow *exception* to the district courts' virtually unflagging obligation to decide cases over which they have jurisdiction into the rule. Contrary to the IUB's claims, its conception of *Younger* is utterly devoid of meaningful limiting principles. In particular, its understanding of *Younger* would mandate exclusive state-court review of essentially all IUB proceedings that are "adjudicatory" in nature, even when (as here) they involve only garden-variety commercial disputes between private parties.

The IUB bases its arguments for *Younger* abstention substantially on decisions not even mentioned by the Eighth Circuit. Unlike the present case, however, the decisions cited by the IUB—including *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice v. Vail*, 430 U.S. 327 (1977), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)—all fit comfortably within the *Younger* categories identified by this Court in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). And nothing about either the holdings or the reasoning of those cases suggests that *Younger* should apply here.

The IUB's argument that the state-court proceeding to which the lower courts deferred *was* coercive borders closely on frivolous. To the contrary, *Sprint* sought review of the IUB proceedings in state court, albeit only because Eighth Circuit law would otherwise have barred Sprint from federal court. Moreover, because Sprint had paid Windstream all disputed monies at the conclusion of the IUB proceedings, there was, as a practical matter,

nothing for the state to "coerce" Sprint into doing by the time of the district court decision to abstain.

Finally, the IUB's vague insistence that the lower federal courts properly abstained because this case *belongs* in state court, since it purportedly involves review of a "state-law proceeding" in which the IUB did not act "as a deputized federal regulator," IUB Br. 8, is both beside the point and wrong. It is beside the point because *Burford* abstention, not *Younger*, is concerned with avoiding federal interference with state regulatory policy, and the IUB itself emphasizes that it does not invoke *Burford* here. And it is wrong because the issues before both the IUB and the courts below were fundamentally federal law issues governed by the Telecommunications Act of 1996 ("1996 Act").

ARGUMENT

I. THE IUB SEEKS TO DRAMATICALLY EXPAND THE SCOPE OF *YOUNGER* ABSTENTION.

The IUB invokes "equity, comity, and federalism," IUB Br. 10, to argue that federal courts should apply *Younger* in deference to virtually all "state civil proceedings involving important state interests" and "state administrative proceedings that are judicial in nature, so long as the federal plaintiff has a full and fair opportunity to present any constitutional claims." IUB Br. 11. But that turns *Younger* on its head, transforming a narrow exception to the "right of a party plaintiff to choose a Federal court where there is a choice," *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415 (1964), into the rule for a broad swath of cases.

A. *Younger* Abstention Is the Exception, Not the Rule.

In *England*, this Court observed that when "Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts," the courts have a "*duty* to take such jurisdiction."[1] *Id.* (emphasis added and internal citation omitted). Against that backdrop, as the *NOPSI* Court wrote, "only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." 491 U.S. at 368. *NOPSI* also sets forth the particular "exceptional circumstances" in which "concern for comity and federalism" has "led [this Court] to expand the protection of *Younger* beyond state criminal prosecutions." *Id.* at 367-68. Specifically, those circumstances include "civil enforcement proceedings" and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.*

But the IUB does not even attempt to argue that the present case fits within the *Younger* categories identified by *NOPSI*. Rather, as noted above, the Board maintains that essentially all "state judicial inquiries" are "entitled to *Younger* abstention." IUB

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[1] For a seminal critique of abstention doctrine on the ground that this duty is ineradicably rooted in separation of powers principles, *see* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L. J. 71 (1984). For a balanced critique of Professor Redish's argument, *see* George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking* Younger *Abstention*, 59 Geo. Wash. L. Rev. 114 (1990).

Br. 17. But this is a dramatic overreading of *NOPSI*; again, the IUB simply ignores the *NOPSI* Court's discussion of what *constitutes* "judicial" state action for purposes of *Younger*. That fundamental error turns the IUB's conception of *Younger* abstention into exactly what *NOPSI* said that it is *not*—a general "doctrine that the availability or ... the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373. In short, the *IUB* improperly transforms *Younger* from the exception into the rule.

B. The IUB's Application of *Younger* Abstention Lacks Meaningful Limiting Principles.

Given that the IUB casts *Younger* as a broad rule, it is not surprising that its brief is devoid of meaningful limiting principles. "[E]quity, comity, and federalism," IUB Br. 10, are all worthy values, but such broad notions do little to trace a practical line between cases in which the federal courts have a "duty" to exercise their jurisdiction, and the narrow subset of abstention cases in which that duty should yield to the "state courts as the final expositors of state law." *England*, 375 U.S. at 415-16.[2]

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[2] There is, moreover, an odd asymmetry to the IUB's notion of comity. While the IUB repeatedly emphasizes the purportedly critical nature of *state* court review of the *federal* issues decided by the IUB, the fact is that "comity works both ways." *Chaulk Servs., Inc. v. Mass. Comm'n Against Discrimination*, 70 F.3d 1361, 1369 (1st Cir. 1995). As discussed in Sprint's opening brief, under this Court's cases, *federal* courts are the final expositors of *federal* law, which is what is at issue here. Pet. Br. 14-18; *see also infra* at 20-24.

Like the Eighth Circuit's decision below, the IUB's broad reconceptualization of *Younger* abstention relies primarily on the three-part test of *Middlesex County*. *See* IUB Br. 13-17. But the Board ignores a critical limitation implicit in *Middlesex County*, as well as explicit limitations contained in the three-part test.

First, as Sprint argued in its opening brief—an argument that the IUB simply ignores—the *Middlesex County* test is, "[r]ead literally," Pet. Br. 28 (quoting *Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001)), far broader than this Court's *Younger* precedents as a whole. That is because *Middlesex County* itself clearly *did* involve one of the three categories of "judicial" action subject to *Younger* abstention that were later identified by *NOPSI*. Specifically, the state bar disciplinary proceedings in *Middlesex County* obviously were "civil enforcement proceedings," *NOPSI*, 491 U.S. at 368, so there was no need for the Court there to pose the question whether the case was of a "*type* ... that is due the deference accorded by *Younger* abstention." *Brown ex rel. Brown v. Day*, 555 F.3d 882, 888 (10th Cir. 2009).

In addition to ignoring this limitation that is *not* expressly stated in *Middlesex County*, the IUB also effectively reads out the limitations that are present in that case's three-pronged *Younger* analysis. First, the IUB essentially substitutes "adjudicatory" for the word "judicial" in the first prong of the *Middlesex County* test. Plainly, however, this expansive understanding of the term "judicial" supplies no limitation at all in connection with state *court* cases. They are *all* adjudicatory by definition. And, even in connection with administrative proceedings, this

"limit" does nothing to distinguish ordinary commercial disputes—like this one—from the kinds of "judicial" cases to which this Court has applied *Younger*, which involve a state's invocation of its criminal or quasi-criminal "judicial" power against a party. *See also infra* at 16-19 (discussing the usefulness of a "coercion" prong in identifying "judicial" cases subject to *Younger*). Such coercive "judicial" power is fundamentally different from disinterested "adjudicatory" authority.

In addition, the IUB reads *Middlesex County*'s "important state interests" limitation so broadly as to render it meaningless. As the Law Professor *amici* point out, the interests that the IUB advances are interests in the state *agency* proceeding. Law Prof. Br. 15-17. But those interests cannot logically constitute "important state interests" for purposes of abstention analysis here, because that is not the proceeding in favor of which the district court abstained—the district court deferred to state judicial *review* of the IUB decision. *Id.* The proper *Younger* question here is thus whether the state's interests in *state* judicial review of the federal questions presented in Sprint's federal case are sufficiently important to trump *federal* court review of those federal questions—which, of course, they are not.

Moreover, even if the state's interests in the IUB proceedings were relevant, the IUB advances interests so broad and general that this prong will always be satisfied in IUB cases. Barring the very slim possibility of utterly rogue action by the Board, its cases presumably *always* involve "[r]egulation of utilities" and "protecting its citizens." IUB Br. 15. In

short, the IUB reads this prong of *Middlesex County* to supply no meaningful limitation on *Younger*.

The IUB also advances certain purported "well-established limits" that it contends suffice to keep *Younger* "within its proper bounds." IUB Br. 20. But, upon closer examination, these "limits" simply evaporate.

First, the IUB claims, "*Younger* abstention does not apply when the state administrative proceedings are legislative in nature, rather than judicial." IUB Br. 21. As discussed above, however, by reading "judicial" to mean "adjudicatory," *see supra* at 6, and ignoring the limitations on the *kinds* of judicial action subject to *Younger* described by *NOPSI*, the IUB vastly broadens the *Middlesex County* test.

The IUB also invokes the "limit" that "[a]bstention is not available if the plaintiff is seeking something other than equitable or other discretionary relief," IUB Br. 21 (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719 (1996)). While true, this supplies no significant limitation with respect to review of IUB or other state-agency decisions on federal-law issues in federal court. Plaintiffs (like Sprint in this case) seeking federal-court review of federal-law issues decided by state agencies are presumably *always* seeking "equitable or other discretionary relief." In other words, a federal plaintiff seeking correction of an erroneous state-agency construction of federal law must necessarily seek declarative and/or injunctive relief from the district court in order to obtain relief at the state agency.

Moreover, upon closer examination, *Quackenbush*—which *affirmed* the Ninth Circuit's

refusal to apply *Burford* abstention—supports *Sprint*'s position here, not the IUB's. Specifically, the *Quackenbush* Court explained that abstention analysis "balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem." 517 U.S. at 728 (internal citation omitted). And "[t]his balance only rarely favors abstention," which "represents an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id.* (internal citation omitted). That is precisely what Sprint argues here—abstention is a rare exception to the "virtually unflagging obligation" of the federal courts to decide issues over which Congress has granted them jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

The IUB's three final purported "limits" on *Younger* bear little discussion. The IUB points out that in cases of judicial bias, *Younger* does not apply. IUB Br. 21. Again, this is true, but as a practical matter it appears unlikely to impose any significant limitation on the application of *Younger* to IUB cases, since bias does not appear widespread within either the IUB or the Iowa state-court system. The IUB's point that "*Younger* abstention does not apply when Congress has declared that state action in specific circumstances should be reviewed in federal court," *Id.* at 21, is also correct—but the fact that Congress has stated that some federal law issues *cannot* be heard in state court does not mean that all other such issues *must* be heard in state court. To the contrary, as discussed above, the background

rule recognizes the "right of a party plaintiff to choose a Federal court where there is a choice," *England*, 375 U.S. at 415, and *Younger* is a narrow *exception* to that rule. Finally, the IUB observes that "abstention is unavailable if any one of the three *Middlesex County* factors is not present," IUB Br. 21—but, as also discussed above, the IUB maintains that those factors are *always* present in its adjudications. *See supra* at 7-9. The logical conclusion—which the IUB confirmed to the Eighth Circuit in oral argument—is that IUB adjudicatory decisions are reviewable only in state court.

In sum, the IUB's conception of *Younger*—that the federal courts must abstain in favor of *all* state court and agency adjudications, so long as an "important state interest" (very broadly defined) exists and the plaintiff can present his federal questions in state court—would represent an enormous and unjustifiable expansion of the doctrine.

C. The Cases on Which the IUB Relies Do Not Support Abstention Here.

Sprint's opening brief pointed out that the Eighth Circuit's decision relied only on *NOPSI* and *Middlesex County*, ignoring all of this Court's other *Younger* cases cited by Sprint. Pet. Br. 24. Sprint further demonstrated that the lower court misread *NOPSI* by ignoring the Court's discussion of the specific, limited categories of "judicial" cases to which *Younger* applies, *Id.* at 25-27, and failed to take the context of *Middlesex County* into account. *Id.* at 27-29.

The IUB does not attempt to respond to Sprint's arguments concerning *NOPSI* and *Middlesex County*, but instead invokes additional *Younger* decisions not mentioned by the Eighth Circuit. Unlike this case, however, those cases—*Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice v. Vail*, 430 U.S. 327 (1977), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)—all fit comfortably within the *Younger* categories identified by *NOPSI*.

1. *Huffman*: The IUB argues that *Huffman* stands for the broad proposition that "federal restraint is appropriate in civil proceedings because the comity and federal interests underlying the *Younger* doctrine fully apply to civil proceedings where important state interests are involved." IUB Br. 12. In fact, however, the import of *Huffman* is more limited, and neither its holding nor its reasoning applies here.

Huffman involved an action brought in state court by "the sheriff and prosecuting attorney of Allen County, Ohio" to enforce Ohio's public nuisance statute, Ohio Rev. Code Ann. § 3767.01 *et seq.* (1971), against the operator (Pursue) of a theater that "specialized in the display of films ... which in numerous instances [had] been adjudged obscene after adversary hearings." 420 U.S. at 595. After the state court entered judgment ordering the theater closed, Pursue filed suit in federal district court seeking to enjoin enforcement of Ohio's nuisance statute on the ground that it was unconstitutional, rather than pursuing state appeals. *Id.* at 598.

The *Huffman* Court acknowledged that *Younger* is based, in part, on "the traditional reluctance of courts of equity ... to interfere with a criminal

prosecution." 420 U.S. at 604. But, the Court noted, "we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases." *Id.* In particular, the Court pointed out that the "State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials." *Id.* As a result, the Court concluded, "an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." *Id.*

Against this backdrop, it is clear that *Huffman* was a "civil enforcement proceeding," as *NOPSI* itself indicates. 491 U.S. at 368. This case, in contrast, arises from a commercial dispute between Sprint and Windstream regarding the intercarrier compensation applicable to certain VoIP calls. The IUB's adjudication of that dispute is neither "in aid of" nor even remotely "related" to any criminal statute. 420 U.S. at 604. Accordingly, this case does not fall within the category of civil enforcement proceedings to which *Younger* has been extended in cases like *Huffman*.[3]

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[3] The IUB also claims that *Huffman* was intended to limit "duplicative legal proceedings," while Sprint purportedly "seeks to present its claims in a repetitive manner; first its federal claim in federal court and then its state claims in state court." IUB Br. 12. Again, however, as Sprint has repeatedly explained throughout this litigation, it filed in state court only because of the Eighth Circuit's rule that "a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies." *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1144 (8th Cir. 1990). *See also infra* at 19.

2. *Juidice* and *Pennzoil:* As with *Huffman*, the IUB invokes *Juidice* and *Pennzoil* for an extremely general principle: "If there is a sufficiently important state interest, comity requires abstention." IUB Br. 24. But, as with *Huffman*, the decisions themselves are far narrower.

As the IUB appears to acknowledge, IUB Br. 24, *Juidice* and *Pennzoil* fall into the category of *Younger* cases that *NOPSI* described as "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." 491 U.S. at 368. This case does not, of course, fit within that category, and the Court's analysis in *Juidice* and *Pennzoil* does not apply here.

In *Juidice*, a default judgment was entered against a debtor named Vail, who then failed to appear when subpoenaed for a deposition relating to satisfaction of the judgment. Juidice, a Justice of New York's Dutchess County Court, issued Vail an order to show cause why he should not be held in contempt. When Vail failed to appear for the hearing, Juidice held Vail in contempt and imposed a fine. Vail and co-plaintiffs filed suit in district court raising federal constitutional challenges to New York's statutory contempt procedures.

This Court found that "[t]he contempt power lies at the core of the administration of a State's judicial system." *Juidice,* 430 U.S. at 335. Accordingly, "[w]hether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal in nature," the "salient fact is that federal-court interference with the State's

contempt process is 'an offense to the State's interest ... likely to be every bit as great as it would be were this a criminal proceeding,' *Huffman, supra*, 420 U.S. at 604." *Juidice*, 430 U.S. at 335-36. The Court further explained that the contempt process clearly "stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 336 n.12 (internal citation omitted).

The concerns expressed by the *Juidice* Court, like those of *Huffman*, are absent here. As noted above, the lower courts here—in which Sprint raised only federal-law issues—abstained in favor of state-court *review* of the IUB decision. A state's interest in federal non-interference with state-court review of a state agency's construction of federal law plainly is not "every bit as great" as a state's interest in federal non-interference with a state criminal prosecution. *Juidice*, 430 U.S. at 336 (citing *Huffman*, 420 U.S. at 604).

Pennzoil is readily distinguishable for similar reasons. Like *Juidice*, *Pennzoil* arose from litigation between private parties. Specifically, Pennzoil filed a tortious-interference-with-contract action against Texaco in Texas state court, *see Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 784-85 (Tex. Ct. App. 1987), and ultimately received a $10.5 billion jury verdict. *Id.* at 784. Under Texas law, the entry of final judgment would permit Pennzoil to obtain liens on Texaco's property; Pennzoil could obtain a writ of execution and begin collecting on Texaco's assets thirty days after entry of judgment. *Pennzoil*, 481 U.S. at 4-5. Texas law further specified that an appeal would delay execution of final judgment, but only if Texaco posted a bond in the amount of the judgment plus interest and costs, approximately

$13 billion. *Id.* at 5-6. Texaco appealed in state court without posting a bond, *id.* at 6 n.5, and—before entry of judgment—filed suit in federal district court claiming that the Texas bond requirement violated its federal constitutional rights. *See Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 251 (S.D.N.Y. 1986). The lower courts enjoined Pennzoil from filing any lien against Texaco or attempting to collect the judgment.

The *Pennzoil* Court's majority opinion found that "[t]he reasoning of *Juidice* controls here." 481 U.S. at 13. The Court explained:

> [*Juidice*] rests on the importance to the States of enforcing the orders and judgments of their courts. There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt. Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts.

Pennzoil, 481 U.S. at 13-14. The *Pennzoil* Court also stated that, "as in *Juidice*, we rely on the State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Pennzoil*, 481 U.S. at 14 n.12.

The present case, of course, has nothing to do with "the processes by which the State compels compliance with the judgments of its courts." *Id.* at 13-14. Nor does it have anything to do with protecting "the authority of the judicial system" in Iowa. And the state had no interest here in "forcing" Sprint to "transfer property," *id.*, since Sprint paid

Windstream in full at the close of the IUB proceedings. Again, the *Younger* question in this case is whether federal courts must abstain based on a state's interest in *state-court* review of a state administrative agency's decisions on issues of *federal* law. *Pennzoil* does not suggest anything of the sort. To the contrary, as *NOPSI* indicates, *Juidice* and *Pennzoil* merely expanded *Younger* to a narrow category of "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." 491 U.S. at 368.

II. THE COERCIVE/REMEDIAL DISTINCTION IS CONSISTENT WITH THIS COURT'S *YOUNGER* CASES.

In addition to claiming that *Pennzoil* and *Juidice* support abstention here—which, as discussed above, they do not—the Board also argues that those decisions are inconsistent with the "coercion" requirement adopted by nearly every court of appeals. IUB Br. 22-29. That argument is wrong, and also misunderstands the purpose of the coercion requirement.

First, the IUB's argument that *Pennzoil* and *Juidice* "cannot be characterized as 'coercive,'" IUB Br. 23-24, is incorrect. Again, in *Pennzoil,* this Court wrote that "[b]oth *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts." 481 U.S. at 13-14. And, as set forth above, this Court described the states' interests in those cases as "forcing persons to transfer property in response to a court's judgment" (*Pennzoil*) and "forcing persons to respond to the court's process on

pain of contempt" (*Juidice*). Given this Court's characterization of *Pennzoil* and *Juidice* as involving states "compelling" or "forcing" compliance, those cases appear entirely "reconcile[able]," IUB Br. 23, with a test applying *Younger* abstention only in the context of coercive state action.

The present case, in contrast, does not involve "the processes by which the State compels compliance with the judgments of its courts." *Pennzoil*, 481 U.S. at 13-14. And Iowa has no interest here in "forcing persons to transfer property in response to a court's judgment." *Id.* There had not, of course, even been a state court "judgment" at the time of the lower courts' abstention decisions.[4] And, as noted above, Sprint paid Windstream *all* monies in dispute at the conclusion of the Board's proceedings, so there was nothing left for Sprint to "transfer." This case is about whether Sprint gets any of that money *back*.

Perhaps more importantly, the IUB also misunderstands the purpose of the coercive/remedial distinction. As discussed above, the *Pennzoil* and *Juidice* cases fall into the category of *Younger* cases that *NOPSI* describes as "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." 491 U.S. at 368. That category of cases is

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[4] The Iowa district court has now ruled on Sprint's state petition for review. *Sprint Commc'ns Co., L.P. v. Iowa Utils. Bd.*, Case No. CVCV008638, slip op. (Iowa Dist. Ct. Sept. 16, 2013). The decision contained errors of federal law and state procedure, and Sprint intends to seek reconsideration in the state trial court and, if necessary, appellate review.

a small one, and presumably does not pose difficult line-drawing problems. Certainly, it is clear that the present case does not involve an "order[] ... uniquely in furtherance of the state courts' ability to perform their judicial functions," *id.*—even the IUB does not appear to argue that it does.

The purpose of the coercion requirement relates to the *other* category of non-criminal cases to which *NOPSI* indicates that *Younger* has been extended—the "civil enforcement proceedings" category. 491 U.S. at 368. As Sprint argued in its opening brief, "in cases where the quasi-criminal nature of state enforcement action is *not* obvious, the coercion inquiry adopted by the vast majority of circuits serves to ensure that an administrative proceeding falls within" the scope of *Younger*. Pet. Br. 29. Thus, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), this Court employed the coercive/remedial line to distinguish coercive proceedings brought by a state to enforce its policy against sex discrimination from a non-coercive employment-discrimination claim brought by an individual in *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). Plainly, for *Younger* purposes, the state's interest in state-initiated civil enforcement proceedings is stronger than its interest in adjudication of private claims of discrimination, and the coercive/remedial line helps to make that distinction.

Finally, though, it bears emphasis that neither the circuit courts that have adopted the "coercion" requirement nor Sprint has ever suggested that "coercion" is the be-all and the end-all of *Younger* analysis. Rather, Sprint argues that the *Middlesex County* prongs, read literally, do not address the

important question whether ongoing state proceedings "fall within the categories to which *Younger* can apply, as later described by *NOPSI*." Pet. Br. 28-29. Cases like *Pennzoil* and *Juidice* that fall into the *NOPSI* category "involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," 491 U.S. at 368, are likely to be rare and readily identified. But the line between purely civil actions (to which *Younger* does not apply) and civil actions in which the state has an enforcement interest (to which *Younger* may apply) is harder to draw, and the "coercion" requirement helps to define it.

III. SPRINT'S STATE-COURT PETITION FOR REVIEW OF THE IUB'S DECISION WAS NOT A COERCIVE STATE ACTION.

The IUB's argument that even if *Younger* abstention requires coercive state action, the state proceeding to which the federal courts deferred *was* coercive borders on frivolous. First, the IUB again focuses on the wrong state proceedings, the "IUB proceedings." IUB Br. 29. Again, at the time of the district court's abstention analysis, the IUB proceedings had concluded. *See* Law Prof. Br. 10-17. Sprint had subsequently sought review of the IUB's decision in the Iowa courts—albeit only because Sprint would otherwise have been barred from federal district court in the Eighth Circuit under *Alleghany*. *Cf. Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 294 n.9 (2005) (finding nothing "inappropriate ... about filing a protective action" in state court).

Plainly, however, Sprint's appeal was not coerced, or at least not coerced by Iowa. Moreover, as noted

above. Sprint had repaid Windstream all disputed monies at the conclusion of the Board proceedings, Pet. Br. 7, so there was nothing left for the state to "coerce" Sprint into doing at the time of the lower courts' decisions to abstain. Finally, there was, in any event, nothing "coercive" about even the IUB proceedings themselves—*Sprint* initiated those proceedings to resolve a commercial dispute, and the IUB's determination not to close them at Sprint's request did not transform them into coercive state action any more than a trial court's denial of a motion for voluntary dismissal of a commercial dispute would transform it into coercive state action.[5]

IV. THE IUB'S SUGGESTIONS THAT THIS CASE INVOLVES PRIMARILY STATE-LAW ISSUES ARE WRONG.

A general theme of the IUB's brief is that the lower courts properly abstained because this case *belongs* in state court, since it purportedly involves review of a "state-law proceeding" in which the IUB acted "in its sovereign capacity" and "not as a deputized federal regulator." IUB Br. 8. Indeed, the

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[5] The IUB's argument that it sought to "coerce" Sprint is particularly odd here because the Board actually *granted* Sprint's motion to withdraw its complaint. Pet. App. 67a. The IUB nonetheless proceeded to address "the parties' rights and obligations (as provided in federal law, state law, and Iowa Telecom's tariff) regarding intrastate switched access charges" applicable to Voice over Internet Protocol (VoIP) traffic. *Id.* at 68a. The Board's decision analyzes *federal* law governing that issue for some fifty-three pages of the Petitioner's Appendix, 72a-125a, but contains no mention of coercion or enforcement.

IUB goes so far as to claim that the "issues before [it] involved straightforward [state] tariff interpretation, akin to contract interpretation." *Id.* at 35. But the IUB's depiction of Sprint's federal case as involving primarily state-law issues that belong in state court is both beside the point and wrong.

The IUB's argument is beside the point because *Burford* abstention, not *Younger*, is concerned with avoiding federal interference—which could be "dangerous to the success of state policies," *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34—in "complex state regulatory system[s]," *NOPSI*, 491 U.S. at 361 (quoting *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 798 F.2d 858, 861-62 (5th Cir. 1986)). But the IUB itself emphasizes that it does not invoke *Burford* here. IUB Br. 34-35. And *NOPSI* makes clear that *Burford* would not apply if the IUB had raised it. Pet. Br. 33-34.

The IUB's argument is wrong because it fails to recognize the fundamentally *federal* nature of the 1996 Act issues before both the IUB and the courts below. The heart of the IUB's misunderstanding is its claim that "[s]tates have primary authority over intrastate services." IUB Br. 19 (citing 47 U.S.C. § 152(b)). Both as a general matter under the 1996 Act, and with respect to the specific legal issues underlying this dispute, that is incorrect. As this Court explained in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999), there is no question under the 1996 Act "*whether* the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." (emphasis added).

The specific dispute underlying this appeal concerns access charges, which are one kind of "intercarrier compensation," or payment made between telephone companies. Access charges are, of course, a "matter[] addressed by the 1996 Act." *Id.* Indeed, as the FCC has explained, Section 251(b)(5) of the Act addresses intercarrier compensation for *all* "telecommunications," without regard to "geographic scope (*e.g.*, 'local,' 'intrastate,' or 'interstate')." *Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17,663, 17,915 ¶ 761 (2011) ("*Intercarrier Compensation Reform Order*").

Again, the IUB claims that notwithstanding the broad scope of Section 251(b)(5), "[s]tates [still] have primary authority over intrastate services," citing 47 U.S.C. § 152(b). IUB Br. 19. But the FCC has specifically "reject[ed] arguments that section 251(b)(5) does not apply to intrastate access traffic." *Intercarrier Compensation Reform Order* at 17,916 ¶ 765. The Commission has likewise rejected claims that Section 152(b) limits federal authority over intrastate traffic, quoting this Court's holding that "[s]uch an interpretation [of Section 152(b)] would utterly nullify the 1996 [Act] amendments, which clearly 'apply' to instrastate services." *Id.* (quoting *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 380).

As the FCC has also explained, for access traffic exchanged *before* issuance of that *Order*—including the traffic at issue in this case—Section 251(g) of the Act "preserved the pre-1996 Act regulatory regime that applie[d] to access traffic," including the rules for intercarrier compensation. *Intercarrier Compensation Reform Order* at 17,916 ¶ 763. The dispute in this case arose because it is unclear what

pre-1996 Act regulatory regime applies under Section 251(g). As *amicus* CTIA explained in its brief:

> Because the Telecommunications Act "regulates telecommunications carriers, but not information-service providers, as common carriers," *National Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005), if VoIP calls are deemed an "information service," then they are not subject to regulation [under § 251(g)] by a state utility commission, *see* 47 U.S.C. § 153(24) .... [But] [i]f VoIP calls were considered a "telecommunications service" and treated like other traditional telephone traffic for intercarrier compensation, then the state regulator (subject to federal law limitations) could decide whether intrastate access charges were appropriate.

CTIA Br. 7. Plainly, however, the question whether VoIP calls made prior to the *Intercarrier Compensation Reform Order* should be treated as "information services" or "telecommunications services" is an issue of *federal* law arising under the 1996 Act. Again, that is the central merits question underlying this appeal.

As Sprint explained in its opening brief, its position before the IUB was that the Board lacked authority to resolve this underlying merits question, because "the issue is a fundamental question of federal law and policy that *only* the FCC may answer." Pet. Br. 7. But the "IUB disagreed, and issued a 50-page analysis both claiming authority to decide the issue and concluding that federal law *does*

permit imposing access charges on VoIP calls." *Id.* Sprint's complaint in federal district court was limited to the question of the Board's authority and the status of VoIP calls—"information service" versus "telecommunications service"—under the 1996 Act. Sprint raised *no* issues of state law. J.A. 6a-8a.

In short, the IUB's repeated suggestions that this case *belongs* in state court because it involves review of a "state-law proceeding," IUB Br. 8, concerning issues of "straightforward [state] tariff interpretation," *id.* at 35, are incorrect. This case involves a federal preemption argument arising under the Supremacy Clause and issues of federal telecommunications law arising under the Telecommunications Act of 1996. Consistent with the federal courts' "virtually unflagging obligation" to decide cases brought before them, *Colorado River Water Conservation Dist.*, 424 U.S. at 817, these issues should be allowed to proceed in federal court unless they fall into one of the narrow exceptions to this general rule under the abstention doctrines. As discussed above, they do not.

CONCLUSION

The judgment of the court of appeals should be reversed.

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SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-815

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit**

JOINT SUPPLEMENTAL BRIEF

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OCTOBER 4, 2013

Under Supreme Court Rule 25.6, the parties submit this supplemental brief to address the Iowa District Court for Polk County's September 16, 2013 ruling in the parallel state lawsuit related to this case. *See* Addendum. The state-court ruling addresses the merits of Sprint's federal-law claims. Sprint has sought reconsideration from the Polk County court and, if its motion for reconsideration is unsuccessful, it intends to appeal the ruling to the Iowa appellate courts.

The parties agree that the state-court ruling on the merits does not affect this Court's jurisdiction to decide the abstention issue here. At the same time, however, the parties recognize their duty to notify this Court of intervening developments that could raise questions about the Court's jurisdiction. *Board of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985). Therefore, out of an abundance of caution, the parties jointly submit this supplemental brief to address the effect of the Iowa District Court's decision on this case under this Court's precedents.

This Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 291 n.7, 293 (2005), is most directly on point. In *Exxon Mobil*, this Court explained that when there is "parallel state and federal litigation," a federal court's "properly invoked concurrent jurisdiction" does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in [the] federal court." *Id.* at 292. Rather, "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Id.* at 293.

In its Memorandum in Opposition to Application for a Stay or Writ of Injunction responding to Sprint's request that this Court stay the state-court proceeding prior to judgment, the IUB stated that "any decision by the Polk County District Court will not have *res judicata* effect until it is final," which, because "an appeal is a near certainty, ... will not be ... for a year or more." IUB Memorandum at 1. *Exxon Mobil* similarly indicates that so long as the losing party in the state-court proceeding "continues to oppose the [state-court] judgment" through the appellate process, then "[t]he controversy ... remains live"—regardless of whether the state-court decision may or may not eventually be claim or issue preclusive in the federal case. *Id.* at 291 n.7. Thus, while the parties likely will disagree regarding any possible *res judicata* effect of the state-court decision once the state appellate process is over, they agree that there is no such effect now. Because Sprint continues to oppose the state-court decision in the Iowa courts, there remains a live issue between the parties.

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ADDENDUM

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SPRINT COMMUNICATIONS, COMPANY, L.P.,

Petitioner,

vs.

IOWA UTILITES BOARD,

Respondent,

And

WINDSTREAM IOWA COMMUNICATIONS, INC., f/k/a IOWA TELECOMMUNICATIONS SERVICES, INC.,

Intervenor.

Case No. CVCV008638

RULING ON PETITION FOR JUDICIAL REVIEW

The above captioned matter came before the Court for oral argument on the record on April 19, 2013 on Petition for Judicial Review filed on April 25, 2011. The Petitioner was represented by attorney Bret A. Dublinske. Mary Whitman, Assistant General Counsel, appeared for the Respondent, Iowa Utilities Board ("IUB"). Attorneys Robert Holz, Jodie McDougal, Edward Krachmer, and Greg Vogt appeared for Intervenor, Windstream of Iowa Communications, Inc.[1] Consumer Advocate of Iowa Mark Schuling and attorney Alice Hyde of the Consumer Advocate Division of the Iowa Department of Justice appeared. After hearing the arguments of counsel and reviewing the court file, including the extensive and thorough briefs filed by all parties, and the certified administrative record, the Court now enters the following Ruling.

RULING

I. BACKGROUND FACTS AND PROCEEINGS.

As pertinent to the case at bar, Sprint Communications Company, L.P. (Sprint) serves as an intermediate carrier partner to cable companies and Windstream Iowa Communications, Inc., f/k/a Iowa Telecommunications Services, Inc., (Iowa Telecom) serves as a local telephone company also known as a "local exchange carrier" or LEC. In

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[1] Windstream of Iowa Communications, Inc. is the successor corporation of Iowa Telecommunication Services, Inc. (Iowa Telecom). During the original proceedings before the IUB this party was referred to as Iowa Telecom, the Court will do likewise here.

relevant part, the networks of Sprint and Iowa Telecom connect through intrastate and interstate "toll trunks." When an Iowa Telecom local customer places a long distance call on Sprint's network or Sprint seeks to deliver a long distance call to such a customer, such traffic is carried over the "toll trunks." In such cases, Iowa Telecom then assesses Sprint what are known as "access charges" compensating Iowa Telecom for Sprint's use of its network to connect to Iowa Telecom's local customer. The provisions of these "trunk" connections are governed by publicly–filed tariffs approved and generally subject to the jurisdiction of the Iowa Utilities Board (IUB).

The dispute here relates to voice traffic that when originated is formatted in Internet Protocol (IP) and is commonly known as Voice over Internet Protocol (VoIP). This is in contrast to the traditional "public switched telephone network" (PSTN) which uses a protocol known as "time division multiplexing" or TDM. Thus, at issue are voice calls that are transmitted in IP rather than TDM. The calls placed by the end user are originated using special customer premises equipment, the cable modem, and a broadband connection from the customer premises. During the call the traffic undergoes a "net protocol conversion," originating at the cable modem IP and being delivered from Sprint to Iowa Telecom on the PSTN in TDM format.

Until mid-2009 Sprint paid access charges to Iowa Telecom pursuant to the Iowa Telecom tariff approved by the IUB for the traffic in question. At that time, Sprint "revisited" its position on the status of the access charges it paid on VoIP traffic

and ceased paying such charges to Iowa Telecom. Sprint claimed VoIP calls were to be treated differently under regulatory regimes than traditional non-IP communications, and thus it should be charged for such usage in a different manner and at a different rate. Sprint not only withheld payment from Iowa Telecom on the disputed VoIP charges, but also withheld undisputed amounts in an attempt to "catch up" for what it believed was overpayment to Iowa Telecom of VoIP charges in the past.

Due to Sprint's not paying its access charges for several months, Iowa Telecom informed Sprint that pursuant to the terms of its tariff it would disconnect Sprint's service unless Sprint paid its outstanding account balance by January 8, 2010. This prompted Sprint to file a Complaint and Request for Emergency Relief with the IUB on January 6, 2010, asking the IUB to intervene and prevent Iowa Telecom from discontinuing services. The Complaint was filed pursuant to the expedited complaint procedures established under Iowa Code section 476.101(8) (2009) for resolution of complaints involving violations, which include violations of section 476.101(9). Sprint specifically asked the Board to require "Iowa Telecom to withdraw its threat of disconnection and provide assurance of continued service, and require Iowa Telecom to resolve the underlying dispute either at the negotiating table with Sprint, or through formal dispute resolution before an appropriate agency or court." (Jt. App. 6).

Iowa Telecom communicated to Sprint and to the Board on January 7, 2010, the following:

> *Solely in the interest of cooperatively resolving its dispute with Sprint* and without making any admission regarding the potential relevance or persuasiveness of your letter of arguments and observations made in your letter of January 5, 2010, *for the time being* and until Iowa Telecom provides at least 30 days written notice, Iowa Telecom *will not discontinue provision of access service to Sprint so long as Sprint remains current on newly-billed access charges*, regardless of the extent to which Sprint has resolved its currently past due amounts.

(Emphasis added). (Jt. App. 19).

Iowa Telecom then filed an Answer and Motion for Injunctive Relief on January 19, 2010. (Jt. App. 23-38). In its Answer Iowa Telecomm noted it had twice denied Sprint's dispute over payment of VoIP. It also recognized the IUP lacks jurisdiction over the provisions of *inter*state access service to Sprint pursuant to Sections 1 and 2 of the Federal Communications Act of 1934. Instead, the Federal Communications Commission (FCC) has jurisdiction over *inter*state communications under 47 U.S.C. sections 151-52. As such, the FCC has occupied the field of *inter*state communications and the IUB had no authority to regulate in that area. However, Iowa Telecom argued all of the traffic at issue here is categorized as *intra*state and thus properly within the jurisdiction of the IUB. In its Motion for Injunctive Relief, Iowa Telecom asked the IUB to order Sprint to pay all withheld *intra*state switched access charge invoices and prohibit it

from setting off funds owing to Iowa Telecom for any other services provided Sprint either now or in the future. It also specifically stated it was willing to withhold its right to enforce its tariff, as long as Sprint continued to pay access invoices, "so that the Board can consider the merits of Sprint's denied dispute on the expedited basis provided by Iowa Code section 476.101(8) for Sprint's complaint." (Jt. App. 32)

On January 22, 2010, the IUB issued an Order Setting Expedited Procedural Schedule. Based on Sprint's request for expedited proceedings under Iowa Code section 476.101, the IUB set a procedural schedule calculated to produce an IUB decision by April 6, 2010. On January 27, 2010, Sprint filed a Motion to Withdraw, Motion for Clarification, and Contingent Motion to Revise Procedural Schedule. Sprint asserted the only issue it raised in its Complaint was that Iowa Telecom was improperly threatening to discontinue service and the only relief it requested was for the IUB to prohibit it from doing so. It argued, therefore, because the threat of Iowa Telecom disconnecting service was no longer pending the IUB should permit Sprint to withdraw its complaint. In the alternative, Sprint requested: (1) suspension of all deadlines until the procedural issues were resolved; (2) to sever Iowa Telecom's non-expedited claims from the proceedings; (3) move forward with the briefing only of the issues of blocking/threatening to block service and of when, how, and to what extent Sprint can withhold disputed amounts because such are "purely legal matters"; and (4) to require Iowa Telecom to clarify whether it is stating counterclaims and issue an order clarifying the scope

of the proceedings and issues to be developed, adjusting the timeline as feasible. (Jt. App. 62-63). More specifically, Sprint conceded the issues of the propriety of Iowa Telecom's blocking or threatening to block service, what the tariff says about the ability of Sprint to withhold disputed amounts, and the jurisdiction of VoIP traffic all presented threshold issues which were purely legal. Sprint stated the outcome on these issues could make it unnecessary to reach the "facts necessary to apply the tariff or VoIP rules to determine what (if any) access charges are appropriate." (Jt. App. 62). Finally, Sprint stated: "Either way, Sprint respectfully requests that the procedural issues in this case be resolved before Sprint is required to file testimony." (Jt. App. 63).

Iowa Telecom resisted, arguing Sprint should not be allowed to withdraw because Iowa Telecom's disconnection forbearance was contingent on the IUB adjudicating the substantive issues underlying the Complaint on an accelerated basis, the controversy was ripe for consideration and likely to arise again quickly, and the issues were already sufficiently clear because its Answer and Motion for Injunctive relief were clear and/or could be considered a counterclaim. (Jt. App. 65-73).

On February 1, 2010, the IUB granted Sprint's Motion to Withdraw its Complaint, but retained the proceeding "in order to give full consideration to the underlying dispute that resulted in the threatened disconnection . . . but not under the expedited procedure established in the Board's docketing order." (Jt. App. 80). In doing so the IUB recognized there was an underlying dispute about the parties'

rights and obligation with respect to the application of tariffed charges to certain telecommunications traffic and that such issues were likely to recur. Thus, the IUB "recast the proceeding to consider Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue." (Jt. App. 81). The IUB did not agree with Sprint that Iowa Telecom had not identified the issues with sufficient clarity, and did not require Iowa Telecom to file any additional claims (counterclaim) or clarification. Without limiting consideration of other issues, the IUB stated the issues related generally to

> the parties' rights and obligations (as provided in federal law, state law and Iowa Telecom's tariff) regarding intrastate switched access charges, including carrier common line charges, and particularly as applied to Voice over Internet Protocol (VoIP) traffic, <u>including non-nomadic VoIP traffic</u>. Related issues include a party's right to withhold payment for disputed charges and a party's right to disconnect service for non-payment. The Board recognizes the beginning of a discovery dispute between the parties regarding the amount of traffic involved. At this stage, however, the Board believes the issues between the parties related to what rules apply to the traffic in question, not the amount of traffic subject to charges. (Emphasis added).

(Jt. App. 81). Finally, the IUB determined these identified issues were purely legal issues and there

were no material factual disputes that required a hearing. Thus, it canceled the rounds of testimony and instead simply required simultaneous briefs and reply briefs from the parties. The Board canceled the hearing that was scheduled and stated it would "not conduct a hearing under the revised procedural schedule unless either party can identify a material factual dispute that makes a hearing necessary." (Jt. App. 82)(emphasis added). None of the parties identified or attempted to identify any issues of fact to the IUB or requested a hearing to present evidence.

Sprint, Iowa Telecom, and the Consumer Advocate Division of the Department of Justice filed initial briefs with the IUB on March 1, 2010, and Sprint and Iowa Telecom filed reply briefs on March 30, 2010. The IUB issued its Final Order resolving all matters on February 4, 2011. The IUB concluded it had jurisdiction over the traffic at issue, which it classified as intrastate non-nomadic VoIP, and its jurisdiction was not preempted by the FCC. The IUB went on further to conclude Iowa Telecom's tariff did require Sprint to pay intrastate access charges to Iowa Telecom for the traffic, that Sprint's practice of withholding undisputed amounts to reimburse itself for amounts it believed it wrongly paid prior to mid-2009 (i.e. by using an "AP Debit Balance account") was not consistent with the tariff, and that Iowa Telecom could not disconnect a wholesale customer such as Sprint without IUB approval due to the potential harm to the end use customers. Sprint filed an Application for Reconsideration and Motion to Stay the payment pending reconsideration both of which were denied buy the IUB on March 25, 2011.

Sprint filed the pending Petition for Judicial Review with this Court on April 25, 2011. On the same date Sprint also filed a complaint for declaratory and injunctive relief with the United States District Court for the Southern District of Iowa, asserting that the IUB's orders are contrary to federal law and only the FCC has the authority to determine whether access charge tariffs apply to VoIP calls. On May 9, 2011, Sprint filed a Motion to Stay in this case arguing it should be stayed until the federal action was resolved. The IUB resisted the Motion to Stay and attached a copy of its Motion for Abstention and Request for Expedited Relief it filed with the federal district court pursuant to *Younger v. Harris*, 404 U.S. 37 (1971) and *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 208 F.3d 874 (8th Cir. 2004). The IUB then filed an Uncontested Motion to Continue Hearing on Motion for Stay to allow the federal court to make its determination. This Court granted the Motion on June 24, 2011.[2]

On August 1, 2011, the federal district court issued a decision granting the IUB's Motion for Abstention and dismissing Sprint's federal Complaint. Sprint appealed and on September 4, 2012, the Eighth Circuit Court of Appeals issued its decision affirming the federal district court's abstention, but vacating the dismissal of Sprint's federal complaint and remanding the case back with instruction for the federal district court to enter a

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[2] This stay is the reason for the significant time that has passed from when Sprint first filed its Petition for Judicial Review.

stay of the federal action. On January 2, 2013, Sprint filed a Petition for Writ of Certiorari with the United States Supreme Court. The Supreme Court granted Sprint's Writ of Certiorari on April 15, 2013.[3] Based on this grant, Sprint filed an Emergency Motion to Stay Proceedings in this Court on April 15, 2013. The IUB, Iowa Telecom, and the Office of Consumer Advocate filed a Joint Resistance on April 16, 2013. This Court denied the Emergency Motion to Stay on April 18, 2013.

In its Petition for Judicial Review Sprint set forth the "Particular Agency Action Appealed From" as: "IUB's determination that Sprint must pay [Iowa Telecom][4] certain fees known as "intrastate access charges" for connecting certain phone calls known as Voice over Internet protocol ("VoIP") calls from Sprint's customers to [Iowa Telecom] customers"; and "Sprint also seeks review of IUB's determination that Sprint violated [Iowa Telecom's] tariff when it withheld payment for certain disputed charges."[5]

Next, Sprint set forth "Grounds on Which Relief is Sought" and stated in summary: (a) that IUB's Order is unconstitutional under the Supremacy Clause and beyond the IUB's authority in that it determined that Sprint is required to pay

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[3] The matter is still pending before the United States Supreme Court.

[4] In the Petitioner, Sprint refers to "Windstream Iowa Communications, Inc."

[5] Section III, paragraphs 4 and 5 of Petition for Judicial Review.

intrastate access charges for the termination of VoIP traffic, which is a question of federal law solely vested in the Federal Communication Commission ("FCC"); (b) the IUB's Order is based on an erroneous interpretation of law which has not been clearly vested in the IUB. Specifically, (1) that the IUB erroneously determined it had authority to decide this issue, (2) the IUB erroneously interpreted the law in finding that VoIP traffic is not an "information service" as defined in 47 U.S.C. §153(24) as interpreted by the FCC, and (3) the IUB erroneously interpreted federal law in concluding that VoIP traffic is not subject to the "impossibility exception" to IUB jurisdiction, which holds that when it is impossible to determine if traffic is interstate or intrastate, the FCC has exclusive jurisdiction; (c) even if the IUB had jurisdiction to determine whether intrastate access charges apply to VoIP traffic, the IUB further erred as a matter of law and otherwise acted irrationally, illogically, or wholly unjustifiably in determining that such tariffed charges may be imposed on Sprint for VoIP traffic; and (d) that the IUB acted arbitrarily, capriciously, and otherwise abused its discretion when it interpreted Iowa Telecom's tariff to prohibit Sprint from withholding disputed charges.

Accordingly, Sprint argues the IUB's actions violate several provisions of Iowa Code section 17A.19(10) (2011) and the decision must be vacated and should either be reversed on the jurisdictional issue or remanded to the IUB for full hearing. The IUB, Iowa Telecom, and the Office of Consumer Advocate all filed Briefs generally contending the IUB did have jurisdiction to decide the issue in

this case and properly decided Sprint's VoIP traffic was subject to the intrastate tariff, as well as appropriately decided the tariff and Sprint withholding issue.

II. SCOPE AND STANDARD OF REVIEW.

A. General. Judicial review of administrative agency decisions is governed by Iowa Code section 17A.19(10). *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 36 (Iowa 2012). A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). Agency action is considered to be arbitrary or capricious when its decision was made with no regard to the law or facts. *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007).

The Court grants considerable deference to an agency's expertise, especially when its decision involves "the highly technical area of public utility regulation." *Office of Consumer Advocate v. Iowa Utils. Bd.*, 663 N.W.2d 873, 876 (Iowa 2003). Because of its highly technical subject matter, we typically defer to the IUB's informed decision so long as it falls within a "zone of reasonableness." *Equal Access Corp. v. Utils. Bd., Iowa Dep't of*

Commerce, 510 N.W.2d 147, 151–52 (Iowa 1993). Therefore, "the majority of disputes are won or lost at the agency level." *S.E. Iowa Coop. Elec. v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001) (internal quotations omitted).

B. Specific as to this case. Iowa Telecom asserts that Sprint was not entitled to an evidentiary hearing because this was "other agency action," and not a "contested case."[6] Iowa Code §17A.2(5) defines contested case as "a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Telecom cites to *Brummer v. Iowa Dept. of Corrections*, 661 N.W.2d 167, 171 (Iowa 2003)(citing to *Greenwood Manor*, 641 N.W.2d at 834 ("A contested case entitles [a party] to an adversarial hearing with the presentation of evidence and arguments and the opportunity to cross-examine witnesses and introduce rebuttal evidence.")). Iowa Telecom argues that if this Court determines that the IUB proceedings were other agency action, not a contested case, then no evidentiary hearing was necessary.

However, the legislature anticipated there may be contested cases where no evidence was necessary, when it enacted Iowa Code §17A.10A – Contested cases – no factual dispute, which provides:

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[6] Page 17-18, Intervenor's Brief.

> Upon petition by a party in a matter that would be a contested case if there was a dispute over the existence of material facts, all of the provisions of this chapter applicable to contested cases, except those relating to the presentation of evidence, shall be applicable even though there is no factual dispute in the particular case.

As noted elsewhere in this ruling, although the parties both indicated the particular issue before the IUB[7]was purely legal, the IUB indicated that a party could "identify a material factual dispute that makes a hearing necessary." Thus, it is clear that the IUB considered this to be a contested case where evidence could be received. For this reason, contrary to Iowa Telecom's suggestion, the Court determines this to have been a contested case proceeding. The judicial review will be of a contested case.

III. MERITS.

A. Procedural Issues.

Sprint first contends the IUB erred by improperly continuing a "moot case" and litigating "counterclaims" that never existed.[8] As set forth above, Sprint filed a Complaint with the IUB seeking emergency relief on the issue of whether

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[7] The issue specifically was whether intrastate access charges apply to VoIP traffic.

[8] Sprint's contention is argued in its brief but, as set out above, it was not specifically alleged in its Petition for Judicial Review.

Iowa Telecom could block or threaten to block its calls under the present circumstances. Iowa Telecom filed a "Partial Answer" agreeing to temporarily not disconnect service while the case was pending. It then filed an Answer and Motion for Injunctive Relief, asserting, in part, it had assessed the appropriate charges under its tariff for the VoIP traffic. The Motion for Injunctive Relief sought, in part, an IUB order directing Sprint to pay Iowa Telecom all withheld intrastate switched access charges. At that point Sprint filed a Motion to Withdraw its Complaint. Iowa Telecom opposed Sprint's Motion.

The IUB granted Sprint's Motion to Withdraw its Complaint. In doing so, the IUB stated the parties both agreed there is an underlying dispute on this issue, and that the pattern is likely to recur. Sprint argues at that point the case should have ended as there was nothing left to proceed on, because the only claim before the IUB was expressly dismissed. (Jt. App. 80). However, the IUB at that point recast the proceeding to consider not only the contested issue of whether Sprint owed Iowa Telecom for intrastate access charges on VoIP traffic, but also Iowa Telecom's claims about the propriety of Sprint's withholding or offsetting access charge payments. Sprint argues it was error for the IUB to proceed with the case, but should have closed the case at that point instead of considering Iowa Telecom's Answer as a "de facto counterclaim."

The Court disagrees with Sprint. First, contrary to Sprint's assertion, the Iowa Administrative Rules do allow for a party to file a "counter-complaint." *See* Iowa Admin. Code r. 199-2.2(9).

Iowa Telecom's Motion for Injunctive Relief provided all the information that is required under the rules for a counter-complaint, although it was not entitled as such. "It is well established . . '[t]he designation given a pleading is not of vital importance. Its character is to be determined largely by its allegations and legal effect, not solely from the name given it.'" *Schulte v. Mauer*, 219 N.W.2d 496, 502 (Iowa 1974) (quoting *Rouse v. Rouse*, 174 N.W.2d 660, 664 (Iowa 1970)). A review of Iowa Telecom's Motion for Injunctive Relief shows it set forth a clear, concise, and complete statement of the facts forming the basis for its claims, its requested relief, and the issues remaining for the IUB's consideration. *See* Iowa Admin. Code r. 199-2.2(9). Accordingly, the IUB did not modify the character of Iowa Telecom's Motion but simply treated it as what it was, which was a counter-complaint. *See Neill v. Western Inns, Inc.*, 595 N.W.2d 121, 126 (Iowa 1999); *Kelly v. Nix*, 329 N.W.2d 287, 290 (Iowa 1983). Thus, the IUB did not err in recasting the proceeding to address what was in essence a counter-complaint by Iowa Telecom.

Second, assuming without deciding the case did become "moot" after the IUB granted Sprint's Motion to Withdraw as Sprint argues, the Court believes an exception to the mootness doctrine would apply here. Courts (or agencies) do not decide cases where there is no longer any actual controversy, unless they exercise their discretion and decide the case under an exception to the mootness doctrine. *Rhiner v. State*, 703 N.W.2d 174, 176–77 (Iowa 2005). "An exception to the mootness doctrine exists where matters of public importance are presented and the problem is

likely to recur.'" *In re T.S.*, 705 N.W.2d 498, 501-02 (Iowa 2005) (quoting *Iowa Freedom of Info. Council v. Wifvat*, 328 N.W.2d 920, 922 (Iowa 1983)). The factors the Court considers to determine whether it will review a moot action are: (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review. *Id.* (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002)). The parties agree the issue is likely to recur; it is undisputedly a pubic matter as it involves telecommunications services provided to the public at large, and because such issues are very likely to recur as technology continues to advance an authoritative adjudication of the issue is very desirable. Thus, this exception to the mootness doctrine is applicable here.

The second procedural argument Sprint makes is, even if the IUB did not err in proceeding with the case after it allowed Sprint to withdraw its Complaint, which the Court has now determined was in fact not erroneous, the IUB should not have ruled on the merits of the "AP Debit Balance" dispute without further hearing and opportunity to present evidence. Throughout the proceedings Sprint has agreed the jurisdictional question is purely a question of law that did not require a hearing. However, it argues both here and in its January 27, 2010 combined Motion to the IUB that the issues of requiring refunds and disallowing its "AP Debit Balance" accounting practices are issues of fact that require an evidentiary hearing before determination. Sprint now argues here that it

believed that the reason it did not request an evidentiary hearing was its belief that IUB would only rule on the jurisdictional issue.

The IUB made it clear in its February 1, 2010 Order on Sprint's combined Motion it disagreed with Sprint that there were any factual issues, and specifically found the issues in the case were all legal issues with no material factual disputes requiring hearing. Additionally, Sprint's right to withhold payments for disputed charges was included in the issues listed by the IUB it would be considering. The IUB specifically stated there would not be a hearing "unless either party can identify a material factual dispute that makes a hearing necessary."

The IUB put Sprint on notice of its determination there were no fact issues but gave Sprint the chance to identify *any* factual issues it believed required a hearing. Thus, it was at that point in the agency proceeding Sprint should have specifically requested a hearing on the refund and AP Debit Balance issues. Even though, as Sprint argues, it was not certain the IUB was going to reach such issues at that point it was definitely a possibility the IUB would find it had jurisdiction and thus decide these issues. Sprint never asked for a hearing or identified to the IUB any material factual dispute. If Sprint believed there were any issues of fact that needed further evidentiary hearing on any issue it should have raised such issue before the agency once it was aware the IUB disagreed with that position.

Accordingly, the Court concludes Sprint has both waived and failed to preserve any challenge

to the lack of a hearing by failing to identify any material facts for the IUB and request a hearing on such issues, especially when it was specifically provided a chance to do so by the IUB. *See Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990) ("A party is precluded from raising issues in the district court that were not raised and litigated before the agency."). Sprint has failed to establish that the IUB failed to comply with or follow any procedural requirements in the handling of this contested case.

B. Jurisdictional Issue.

The primary issue raised by the parties was whether the IUB has jurisdiction to approve and enforce an Iowa Telecom tariff that permitted it to charge Sprint for *intra*state access charges on non-nomadic VoIP traffic.[9] Sprint claims the IUB does not have such jurisdiction because (1) Sprint's traffic constitutes "information services" which the FCC has determined is under its exclusive jurisdiction[10], and (2) once the communication is internet protocol (IP), it is impossible to determine if it is interstate or intrastate and due to this the FCC and not state regulatory agencies has jurisdiction.[11] Iowa Telecom argues that where the end users can be

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[9] The significance of nomadic versus non-nomadic will be discussed later.

[10] "Information services" are not subject to access charge regimes. *In re A T & T Access Charge Petition*, 19 F.C.C.R. 7457, 7459-61, ¶¶ 4-7 (2004).

[11] This is referred to as the "impossibility" rule.

determined and the communication is non-nomadic and remains *intra*state, regardless if it is converted to VoIP, the traffic constitutes "telecommunications services" over which the FCC has determined state regulatory agencies retain jurisdiction and thus the IUB may properly exercise jurisdiction.

The parties' arguments to this Court mirror those argued before the IUB. Sprint's arguments are premised on its assertion that a reading of court cases and FCC orders[12] leads to the conclusion that the information, including voice communication which travels over the internet (VoIP), has been particularly carved out as within the exclusive jurisdiction of the FCC and has preempted jurisdiction by state utility boards, including the IUB. Specifically, Sprint argues that since the traffic in question undergoes a "net protocol change," in other words, is transposed from the old voice-over-line transmission and is converted to packets for transmission over the internet under "Internet Protocol," even though converted back to land–line equipment for reception by the end user, this is sufficient to make such traffic "information services" and trigger FCC jurisdiction pursuant to the 1996 Telecommunication Act.[13]

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[12] Upon this Court's review of the various FCC Orders Sprint relies upon, that the FCC has in these rulings walked a tight rope on a case by case basis, determined on the specific facts and disputes of each case, without stating an overall jurisdiction policy.

[13] The Act defines "information services" in 47 U.S.C. §153(20) to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

Sprint argues a second reason for FCC jurisdiction is that once there is a "net protocol change," the communication ("packets") flows through the internet where it is not bound to travel intrastate, even if the call end users (initiator and receiver) are within the same state. The argument is that the packets will flow through the internet in an infinite number of available paths that are not restricted or known to be solely within a state's borders and are therefore interstate in nature. Thus, even though the phone call may be between two end users within the same state, if VoIP is being used, it is not necessarily intrastate; there is no way to know ("an impossibility") and therefore the FCC rather than the state regulatory agency appropriately assumes jurisdiction and preempts state-agency jurisdiction.[14] In addition, Sprint contends that an end user may initiate a VoIP call using a computer while not within the state, even though the identifying telephone area code may indicate an intrastate call, again creating an "impossibility" to determine whether the call is truly interstate or intrastate.[15] These arguments are despite the fact, which Sprint acknowledges, the FCC has not definitively set out a bright or clear line adopting

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information via telecommunications . ." See Jt. App. 325.

[14] Thus, this is known as the "impossibility" exception.

[15] The IUB identifies these as the "preemption through information services exception" and the "preemption through impossibility exception." (Jt. App. 301).

this approach. (Jt. App. 300).[16] This lack of a bright line is due to the evolving technology.

Iowa Telecom argues that the FCC allows the application of intrastate access charges when the VoIP traffic originates and terminates in different local calling areas (LCA's) in the same state (intrastate). It contends that in this case, voice traffic initiated by an end user, transmitted by Sprint as a common carrier, terminated to Iowa Telecom's network as a TDM message, and delivered to an end user on Iowa Telecom's network constitutes "intrastate access services,"[17] is therefore within the IUB's jurisdiction and permits Iowa Telecom to enforce its tariff. In particular, Iowa Telecom distinguishes this fact pattern as being non-nomadic as compared to nomadic VoIP based telecommunication.[18]

In its Order, the IUB set out the arguments and authorities submitted by Sprint, Iowa Telecom and the Consumer Advocate on each issue and then in a discussion, thoroughly analyzed these arguments and the legal authority put forth in

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[16] See *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n*, 461 F.Supp.2d 1055, 1081 (E.D. Mo. 2006)("Although the FCC has not yet ruled whether IP–PSTN is such a service, the orders it has issued *lead to the conclusion* that IP–PSTN is an 'information service.'"(emphasis added)).

[17] See Jt. App. 299 and IUB Rule 199 IAC 22.1(3).

[18] The Act defines "telecommunications" in 47 U.S.C. §153(46) to mean "the offering of telecommunications for a fee directly to the public . regardless of facilities used." Jt. App. 325.

support of those arguments. The Court will not set out each and every argument, but will discuss below the significant points that lead this Court to conclude that the IUB's Order is proper and should stand. After a careful and exhaustive analysis, the IUB agreed with Iowa Telecom's position in its Final Order.[19]

> The Board agrees with Iowa Telecom's assertion that when Sprint delivers the VoIP traffic to Iowa Telecom's network, Sprint is acting as a telecommunications carrier and is thus subject to Iowa telecom's intrastate access tariff and the Board authority regarding the application of intrastate access charges.[20]

The IUB went on to find: "The Board concludes that any policy concerns raised by Sprint should be resolved in favor of maintaining the present access charge system which the FCC has not revised at this time (and may not revise in a way that affects the traffic in any manner)."[21] As stated in its "Summary" the IUB found "that Sprint's VoIP traffic discussed in this case is jurisdictionally intrastate and subject to state regulation and Iowa Telecom's intrastate switched access tariff. The Board concludes its jurisdiction has not been preempted because the FCC has not ruled that cable telephony is an interstate information service and because the impossibility exception does not

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[19] Jt. App. 288-368.

[20] Jt. App. 320

[21] Jt. App. 323.

apply to the traffic at issue in this proceeding."[22] Understandably, Sprint now contends on this appeal that the IUB's legal analysis does not support this conclusion and its decision was wrong.

The IUB specifically rejected Sprint's proffer and declined to adopt the single prong "net protocol conversion" test advanced by Sprint as determinative of jurisdiction. The IUB in its Final Order made a specific fact finding that:

> Sprint and its cable partner MCC have held themselves out as providers of telecommunications services and have been recognized as such by the Board and the Eighth Circuit Court of Appeals. Because the traffic is intrastate and between exchanges in Iowa, the Board's rule 199 IAC 22.14(1)"a" (which provides that intrastate access charges shall apply to all intrastate access services rendered to interexchange utilities) and the terms of Iowa Telecom's tariff require the payment of access charges, unless the traffic is non-jurisdictional.[23]

Sprint first contends that interpreting the FCC *Pulver Ruling* broadly, the FCC intended for it to apply to IP-PTSN/VoIP. Sprint even acknowledges that *Pulver* dealt with IP-IP voice service, while the subject in the current dispute involved IP-PSTN, which is equivalent to IP- TDM. It is

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[22] Jt. App. 367.

[23] Jt. App. 321.

important to note, as the IUB pointed out, that this case deals with IP to PSTN traffic, not IP to IP traffic.[24] The IUB rightfully rejected application of *Pulver* for the two reasons in it Order.[25] Significantly, in *Pulver*, the FCC indicated that broader jurisdictional questions would be addressed in the *IP-Enabled Services NPRM* Ruling issued the same day as *Pulver*. However, the FCC never followed through with rules in that proceeding.

As noted above, Sprint relies heavily on the "net protocol conversion" concept, i.e. by originating in IP format and terminating in TDM format, which was discussed in the FCC's *IP- Enabled Services NPRM* ruling, which referenced the *Stevens Report*[26] to Congress. The report stated that service has the characteristics of "telecommunications" if it met four criteria:

> (1) it holds itself out as providing voice telephone he or facsimile transmission service; (2) it does not require the customer to use CPE[27] different from that CPE necessary to place an ordinary touchtone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and

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[24] Jt. App. 326.

[25] Jt. App. 327.

[26] This is also referred to by Sprint as the "Joint Board Report." Petitioner's Brief, pg. 11.

[27] CPE is consumer premise equipment.

> associated international agreements; and (4) it transmits customer information without net change in form or content.[28]

Sprint argues before the Court that the IUB made a finding that Iowa Telecom's traffic in this case meets this definition for "telecommunication," but that this was error because it fails to meet prongs 2 and 4, or at the very least, fact questions exist that would necessitate a hearing. However, the IUB did not make this specific finding. The IUB pointed out that this was discussed, but the FCC has never completed the rule making under *IP-Enabled Services NPRM*. The IUP stated:

> Specifically, in that rulemaking the FCC announced its intent to "examine issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services (collectively, "IP-enabled services.")" In other words, whether a particular IP voice service would be considered to be an information service or telecommunication service, and to what extent net protocol conversion is part of that consideration, would presumably be determined through the *IP-Enabled Services NPRM*. The rule making asked numerous questions key to the FCC's determination. As noted above, that rulemaking has not been completed.

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[28] See 47 U.S.C. §153 (43).

As the IUB found, and this Court finds substantiated, the FCC only referenced the characteristics set out in the *Stevens Report* and did not complete the rule making that might have adopted it. The Court finds no error in this regard.

Sprint relies on *PAETEC Communications, Inc. v. Commpartners, LLC*, 2010 WL 1767193 (D.D.C. 2010), a United States district court case. In that case, *PAETEC* sought compensation for telephone calls made to individuals on its network (TDM) that originated on the network of CommPartners (VoIP). The federal Minnesota district court noted that the information services versus telecommunication services debate has "been raging for years."[29] Further, "The FCC, which has had the controversy on its docket for a decade, has been unable to decide it." There is no question, upon reading *PAETEC*, that after a comprehensive analysis of the issue, that court stated:

> There are two types of calls at issue, to which different compensation regimes may apply: (1) calls that began on CommPartners' network in VoIP before being converted by CommPartners to TDM for transfer to PAETEC (the "VoIP-originated calls"); and (2) calls that both began and were transferred in TDM (the "TDM-originated calls").

The facts here are the same as set out under (1) in the quote – VoIP to TDM traffic. The *PAETEC*

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[29] *PAETEC*, at p.3.

court, relying on two other federal district court cases[30], found

> Both have decided that transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges. *See Sw. Bell*, 461 F.Supp.2d at 1081–83; *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 999–1001 (D.Minn.2003). Their reasoning is persuasive. As the *Sw. Bell* court observed, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service."

Following these two precedents, the *PAETEC* adopted the "net protocol conversion" test and held such traffic is information service and under exclusive FCC jurisdiction. The IUB acknowledged this holding, but rejected that court's determination or that it was binding precedent and had to be followed, agreeing with Iowa Telecom that the *PAETEC Decision* is "unpublished, non-final, and partial."[31] The IUB did so, stating:

> The *PAETEC Decision* reduces that multitude of considerations identified by the FCC to a single pronged test. Under

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[30] *Southwestern Bell Tel., L.P. v. Mo. Pub. Serv. Comm.*, 461 F.Supp.2d 1055, 1074 (E.D.Mo.2006) and *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 999–1001 (D.Minn.2003).

[31] Jt. App. 329.

> the *PAETEC Decision*, all that needs to happen for a service to be classified as an information service (and thus be subject to federal jurisdiction) is a net protocol conversion. . . . The 12-page *PAETEC Decision* does what the FCC never completed in the IP-Enabled Services docket, and does so without acknowledging any distinction between various types of IP- Enabled services previously identified by the FCC.

More important, this Court finds the IUB's argument in this appeal that those two federal district court decisions relied upon by the *PAETEC* court did not address a distinction between nomadic and non-nomadic of "fixed VoIP" traffic. This is especially true considering the more recent Eighth Circuit Court of Appeals decision in *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).[32] After describing generally the various

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[32] This circuit opinion also involved Vonage, but is to be distinguished from the *Vonage Order*, *In re Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, 199 FCC Rec. 22404, rel. Nov. 12, 2004 and *Vonage Holding Corp. v. Minnesota PUC*, 290 F.Supp.2d 993 (D.Minn.2003)(relied on in *PAETEC*). It should be noted that the FCC determined in the *Vonage Order* that because the physical location of end users could not be known for certain, the impossibility reasoning applied which dictated the traffic to be information service and required FCC jurisdiction. Under the Eighth Circuit analysis, the result would be different if the location of end users can be determined as

technologies, including VoIP versus tradition landline to landline communications, the circuit court noted:

> A distinction can be drawn, however, between what is referred to as "nomadic" VoIP service and "fixed" VoIP service. Nomadic service is the type described above, where a VoIP customer can use the service "nomadically" by connecting with a broadband internet connection anywhere in the universe to place a call. Fixed VoIP service describes the use of the same technology, that is, converting a voice communication into digital packets before transmitting it to another location, but in a way where the service is used from a fixed location. For example, cable television companies offer VoIP service to their customers, but when they do so the ensuing transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined. Thus, when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished.

Later, in its opinion, the circuit court cited to an FCC ruling on whether the impossibility of

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acknowledged by the FCC in *Universal Serv. Contribution Methodology*.

identifying the originating location of a VoIP call would always trigger FCC jurisdiction:

> Moreover, subsequent to issuing the order we are reviewing, the FCC recognized the potentially limited temporal scope of its preemption of state regulation in this area in the event technology is developed to identify the geographic location of nomadic VoIP communications. In proceedings to address VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated
>
> > an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.
>
> *Universal Serv. Contribution Methodology*, 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006), 2006 WL 1765838.
>
> Similarly, we emphasize the limited scope of our review of the FCC's decision. Our review is limited to the issue whether the FCC's determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale

> of the FCC's decision, its preemptive effect may be reexamined.

It is clear that the Eighth Circuit, as does the FCC, recognizes the distinction between nomadic and non-nomadic traffic.[33] The Eighth Circuit case was then acknowledged in the FCC Maine Order filed on October 27, 2010.[34] The FCC stated:

> An interconnected VoIP provider *with a capability to track the jurisdictional confines of customer calls* would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an

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[33] In *Universal Serv. Contribution Methodology*, the FCC concluded that the agency

> has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of calculating universal service obligations, we find no basis at this time to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service that have entered the market, so long as state contribution requirements are not inconsistent with the federal contribution rules and policies governing interconnected VoIP service. Declaratory Ruling , ¶ 15.

[34] See Jt. App. 346, footnote 36.

> interconnected VoIP provider. (Emphasis added).

The question then becomes, under the facts of the case before the IUB, could and did the IUB determine that the present case involved non-nomadic traffic. The IUB noted that from 2004 - 2009 Sprint had accepted that its service was telecommunication and not information service. Nothing had changed, neither factually nor in any specific legal guidance in 2009 to cause Sprint to suddenly determine it was not obligated to pay its access charges to Iowa Telecom under the tariff.[35] The IUB determined that the traffic in this case in non-nomadic. It stated:

> Sprint's willingness to pay access charged on this traffic until 2009 is evidence that an end-to-end analysis for this traffic is possible, i.e., that Sprint is able to identify the geographic endpoint of a call with adequate reliability.[36]

As noted by Iowa Telecom, and found by the IUB, both the IUB and the Eighth Circuit had previously addressed Sprint's earlier representations that it provided telecommunication service. The IUB had ruled, and the Eighth Circuit affirmed, that Sprint, in the role as MCC Telephony of Iowa, Inc.'s carrier partner, may be considered a telecommunications carrier (common carrier) when

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[35] It is noted that the *PAETEC* Decision came down in 2010, a full year after Sprint's challenge.

[36] Jt. App. 336.

performing this partnering function with MCC.[37] This representation was made by MCC when it applied to the IUB for its Iowa certificate.[38]

Finally, Sprint contends that since the jurisdiction appears to be "in doubt," the IUB should withhold its determination until the FCC decides definitively that it does or does not have jurisdiction over this issue. However, as the IUB pointed out, under the FCC *UTEX Decision*, it need not defer its decision until the FCC has acted. In light of the case law that has found the FCC has had such issues before it for a lengthy time and has not resolved the jurisdictional controversy, it is appropriate that the IUB did not defer.

This Court finds that it was appropriate for the IUB to determine that *PAETEC* and the two federal district court cases it relied upon did not correctly address the nomadic/non-nomadic distinction and thus were not precedent that the IUB was obligated to follow. The more recent Eighth Circuit case set forth the status of the law and identified this distinction. The IUB had sufficient facts before it to determine that Sprint, under the facts in this case, was providing non-nomadic traffic and could be determined to be intrastate so that the IUB retained jurisdiction to decide the matter. The IUB was not required by

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[37] Citing to *Sprint Communication Co. L.P. v. Ace Communications Group, et al.*, Docket No. ARB-05-2, "Order on Rehearing" (November 28, 2005), and *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743, 749 (8th Cir. 2009).

[38] Jt. App. 303 and 321.

either the "information service exception" or the "impossibility exception" to refrain from exercising its jurisdiction. Further the IUB was correct in determining that the FCC in its own rulings has not carved out jurisdiction for itself so as to preempt state agency jurisdiction. The Court finds that the IUB did not incorrectly apply the law.

C. The "Accounts Payable (AP) Debit Balance" Issue

Sprint's final contention is that the IUB erred further, after making its decision that it had jurisdiction, it ruled on the merits of the dispute between Sprint and Iowa Telecom without affording Sprint a hearing. The Board did rule on two related matters. First, the IUB found that Sprint's use of offsetting what it determined it had paid Iowa Telecom the interconnected VoIP that it did not owe and applying an "accounts payable debit balance" method was improper under Iowa Telecom's tariff. Second, Iowa Telecom improperly threatened to terminate Sprint's access to Iowa Telecom's network due the non-payment of tariff access charges without first seeking the IUB authorization for such termination.[39]

Sprint claims that the IUB violated its own rules[40], the statute (Iowa Administrative Procedure Act)[41] and the constitutional right to due process[42]

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[39] This part of the IUB Final Order has not been appealed by Iowa Telecom.

[40] 199 I.A.C. 7.23; cited at Sprint's Brief, pg. 19.

[41] Iowa Code §17A.12(1); cited at Sprint's Brief, pgs. 18-19.

in failing to provide Sprint a hearing on these issues. Sprint further points out that such a hearing is to be live, with the opportunity to cross-examine witnesses.[43] Sprint argues there are places in the IUB's ruling where it made a finding that Sprint's position was not supported in the record or unclear from the record. The implication is that the IUB needed to hold a hearing in order to receive evidence to rule on Sprint's "AP Debit Balance" position.

As noted in Sprint's Reply Brief, neither the IUB, the Consumer Advocate, or Iowa Telecom argue in their Briefs to this Court this issue of lack of hearing.[44] At the oral arguments before this Court, these parties contend that Sprint raised and addressed this issue in its Brief submitted to the IUB; that Sprint was the party that initiated this matter and asked the IUB to resolve. A review of Sprint's initial brief to the IUB[45] shows that the very first issue Sprint set out concerned its

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[42] Citing to *War Eagle Village Apts. v. Plummer*, 775 N.W.2d 714, 719 (Iowa 2009)(deciding a violation of Article 1, Sect. 9 of the Iowa Constitution – based on lack of adequate notice, not denial of a hearing), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)(evidentiary hearing not required before termination of social security disability benefits by agency); at pg. 18 of Sprint's Brief.

[43] Iowa Code §17A.12(7) and 199 I.A.C. 7.23; cited at Sprint's Brief, pg. 19.

[44] Petitioner's Reply Brief filed February 27, 2013, at pg. 6.

[45] Jt. App. Pg. 102, filed on March 1, 2010.

withholding of disputed amounts under Iowa Telecom's tariff.[46] Sprint proceeded to argue its position, challenging the tariff language, and that it appropriately used the "AP Debit Balance." Finally, Sprint concluded: "The Board should find that Sprint acted appropriately, and that its use of an AP Debit Balance did not provide justification for Iowa Telecom to threaten unilateral blocking of live traffic." Despite Sprint being well aware of the IUB's earlier Order regarding briefs and the need for any party to request a hearing to present evidence, there is nothing in the record that Sprint ever requested a hearing. Only after the IUB decided this issue does Sprint now claim surprise and that its rights have been violated by no hearing being provided by the IUB.

As noted in *PAETEC Communications, Inc. v. Commpartners, LLC*, 2010 WL 1767193 (D.D.C. 2010) "tariffs once approved are the law, and not mere contracts," citing *Bryan v. Bellsouth Comm'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004)." The IUB found regarding the tariff:

> The tariff at issue in this case contemplated withholding of disputed balanced but did not contemplate Sprint's use of an AP Debit Balance account. Sprint's use of the debit balance account

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[46] Jt. App. Pg. 103 ("SPRINT'S CONDUCT IN DISPUTING IOWA TELECOM'S VOIP CHARGES WAS APPROPRIATE AS SPRINT PROPERLY WITHHELD DISPUTED AMOUNTS AS EXPRESSLY PERMITTED BY THE IOWA TELECOM TARIFF ")

> amounted to unilateral withholding of undisputed payments. The Board concludes that by using an AP Debit Balance account, Sprint did not properly dispute Iowa Telecom's switched access charges as permitted by Iowa Telecom's tariff.[47]

Thus, the IUB made a legal determination. Sprint has not pointed to any issue of fact that it needed to present to the IUB for the IUB to make the legal determination of law as established by the tariff.

As this Court pointed out above, the Iowa legislature, in establishing the IAPA, contemplated and anticipated just such a situation when it adopted Iowa Code §17A.10A. This section applies here when there is no dispute of fact. The IUB was applying Iowa Telecom's tariff to the undisputed facts. Sprint does not dispute, as the IUB found, as alleged in the Sprint Complaint filed in July 2009,

> that Iowa Telecom had been assessing traditional terminating access charges on VoIP traffic. Sprint claims it properly disputed those charges by withholding the disputed amounts. As described above, Sprint also established an AP Debit Balance account by placing on its books the value of the amounts Sprint determined it had overpaid for a past period as if they were amounts *owed* to Sprint from Iowa Telecom. Apparently, the "overpayment" amounts were larger than

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[47] Jt. App. 357-358.

> the disputed charges owed to Iowa Telecom, which according to Sprint, resulted in no current account payable amount owed to Iowa Telecom.[18]

These are all the facts the IUB needed to apply the tariff – the law. As the IUB noted later, "this proceeding was not intended to determine the precise amounts in dispute." A hearing was not required because (1) there was no dispute of fact; (2) the IUB made a legal application regarding the tariff in determining the invalidity of Sprint's use of AP Debit Balance; and (3) Sprint failed to request an evidentiary hearing. The IUB did not violate its own rules, the Iowa Administrative Procedure Act or Sprint's due process rights under the Fifth Amendment to the United States Constitution or Art. 1, section 9 of the Iowa Constitution.

IV. CONCLUSION AND DISPOSITION.

Under the specific facts of this case, the Court finds that (1) the issues determined by the IUB were procedurally properly before it; (2) the IUB properly determined it had jurisdiction and properly exercised it in ruling on the issues; and (3) the IUB did not improperly deny Sprint an evidentiary hearing or violate its own rule, a statute or Sprint's constitutional due process rights. The IUB did not violate Iowa Code §17A.19(10) in either the procedural handling of this agency proceeding, or in its substantive rulings.

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[18] Jt. App. 355.

V. ORDER

IT IS ORDERED that the Final Order of the Iowa Utilities Board issued on February 4, 2011 is AFFIRMED. Costs of this appeal are assessed to the Petitioner.

State of Iowa Courts

Type: OTHER ORDER

CASE NUMBER	CASE TITLE
CVCV008638	SPRINT COMMUNICATIONS COMPANY VS IA UTILITIES BOARD

So Ordered

Richard G. Blane II,
District Court Judge, Fifth
Judicial District of Iowa

AMICUS CURIAE BRIEF

No. 12-815

IN THE
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.

Petitioner,

v.

ELIZABETH S. JACOBS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. The Eighth Circuit's Holding Is Inconsistent With This Court's Cases Defining The *Younger* Doctrine. 7

B. The Eighth Circuit's Holding Is Inconsistent With The Rationales Underpinning *Younger*. 10

C. The Eighth Circuit's Understanding Of *Younger* Is An Outlier Among The Courts Of Appeals. 12

D. Adopting The Eighth Circuit's Approach To *Younger* Would Frustrate Federal Judicial Review Of Federal Challenges To State Agency Action. 15

E. Any Affirmance Should Be Limited To The Specific Circumstances Of This Case. ... 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Alleghany Corp. v. McCartney,
896 F.2d 1138 (8th Cir. 1990) 16, 21, 24

Allen v. McCurry,
449 U.S. 90 (1980) 22

Brown v. Day,
555 F.3d 882 (10th Cir. 2009) 13, 14

Colorado River Conservation Dist. v. United States,
424 U.S. 800 (1976) 3, 11, 12

County of Allegheny v. Frank Mashuda Co.,
360 U.S. 185 (1959) 12, 15

Devlin v. Kalm,
594 F.3d 893 (6th Cir. 2010) 9, 13, 23

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 23

Freehold Cogeneration Assocs. v. Board of Regional Commissioners,
44 F.3d 1178 (3d Cir. 1995) 18, 19

Guillemard–Ginorio v. Contreras–Gomez,
585 F.3d 508 (1st Cir. 2009) 13

Hicks v. Miranda,
422 U.S. 332 (1975) 17

Hudson v. Campbell,
663 F.3d 985 (8th Cir. 2011) ..... passim

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975) 7, 8, 11

Juidice v. Vail,
430 U.S. 327 (1977) 8

Kelly v. Robinson,
479 U.S. 36 (1986) 10

Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n,
791 F.2d 1111 (3d Cir. 1986) 19

Louisiana Public Service Commission v. FCC,
476 U.S. 355 (1986) 18

Majors v. Engelbrecht,
149 F.3d 709 (7th Cir. 1998) 21

Maymo-Melendez v. Alvarez-Ramirez,
364 F.3d 27 (1st Cir. 2004) 21

Middlesex County Ethics Comm. v. Garden State Bar Ass'n,
457 U.S. 423 (1982) 9

Moore v. City of Asheville,
396 F.3d 385 (4th Cir. 2005) 13, 14, 21

Moore v. Sims,
442 U.S. 415 (1979) 7, 8, 12, 14

Nader v. Keith,
385 F.3d 729 (7th Cir. 2004) 13, 23

Night Clubs, Inc. v. City of Fort Smith,
163 F.3d 475 (8th Cir. 1998) 16

Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas,
489 U.S. 493 (1989) 18

O'Neill v. City of Philadelphia,
32 F.3d 785 (3d Cir. 1994) 13, 21

[illegible] Civil Rights Commission v. Dayton Christian Schools, Inc.,
477 U.S. 619 (1986) 9, 10, 15

Patsy v. Bd. of Regents,
457 U.S. 496 (1982) 9

Pennzoil Co. v. Texaco, Inc.,
481 U.S. 1 (1987) 8, 14

Planned Parenthood League v. Bellotti,
868 F.2d 459 (1st Cir. 1989) 13

Sprint Commc'ns Co. v. Jacobs,
690 F.3d 864 (2012) ..... passim

Thomas v. Texas Bd. of Med. Exam'rs,
807 F.2d 453 (5th Cir. 1987) 21

Trainor v. Hernandez,
431 U.S. 434 (1977) 7, 8, 10, 14

Univ. Club v. City of New York,
842 F.2d 37 (2d Cir. 1988) 13

Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002) 18

Younger v. Harris,
401 U.S. 37 (1971) ..... passim

Statutes and Regulations

Iowa Code § 17A.19(3) 24

Telecommunications Act of 1996,
Pub. L. No. 104-104, 110 Stat. 56 19

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of Petitioner Sprint Communications Company, L.P. ("Sprint").[1]

INTEREST OF *AMICUS CURIAE*

Founded in 1912, the Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The correct resolution of this case, and in particular the rejection of the Eighth Circuit's expansive understanding of abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is important to businesses that are subject to dual federal and state regulatory regimes, such as businesses in the telecommunications industry. Regulated entities in such industries participate in state administrative proceedings and may find it

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties in this case have granted blanket consent to the filing of *amicus curiae* briefs.

necessary to seek relief in federal court either to block such proceedings or to challenge the outcome of completed proceedings. The Eighth Circuit's interpretation of *Younger* limits the ability of regulated entities to secure a federal forum for hearing their federal-law challenges to state-agency proceedings. Correct resolution of this case is therefore of particular interest to the Chamber and the businesses it represents.

SUMMARY OF ARGUMENT

The *sine qua non* for the application of *Younger* abstention is the pendency of a state proceeding that is coercive in nature, in which a State seeks to enforce its own laws. The critical distinction between "coercive" and "remedial" state proceedings is evident from this Court's cases extending *Younger* from the context of criminal prosecutions (in which it was first applied) to certain civil and administrative enforcement proceedings. Indeed, the Court has expressly endorsed that distinction in defining the scope of *Younger* abstention. Moreover, the twin rationales underpinning *Younger*—proper respect for the role of States in our federal system and traditional limitations on federal equity jurisdiction—simply do not apply in the context of remedial state actions. By exercising jurisdiction while a state remedial action is pending, a federal court does nothing to interfere with a State's prerogative as a sovereign to enforce its own laws. And it was never a rule of equity that the mere pendency of a related action in another court was enough to require abstention.

For those reasons, every Court of Appeals that has addressed the issue (other than the Eighth Circuit) has held that *Younger* abstention is appropriate only when a related state proceeding is coercive in nature. The

pendency of a purely remedial state proceeding, by contrast, does not warrant *Younger* abstention and is instead subject to the general rule that the "pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (internal quotation marks omitted).

Under that rule, *Younger* abstention was not appropriate in this case. The underlying state agency proceeding here lacked any of the hallmarks of a "coercive" action intended to enforce state law. The State of Iowa did not initiate enforcement proceedings before the Iowa Utilities Board ("IUB") in an attempt to enforce its laws against Sprint. Instead, Sprint voluntarily petitioned the IUB to help resolve a commercial disagreement with another private party over the propriety of certain charges. Sprint, in other words, sought relief in the IUB solely for remedial purposes.

The Eighth Circuit nonetheless concluded that Sprint's remedial proceeding before the IUB warranted *Younger* abstention. *See Sprint Commc'ns Co. v. Jacobs*, 690 F.3d 864, 869 (2012). In doing so, it expressly rejected the distinction between coercive and remedial state proceedings. *Id.* at 867. Instead, the Eighth Circuit explained that, under its jurisprudence, *Younger* abstention applies to *any* ongoing state judicial proceeding—whether coercive or remedial—so long as that proceeding "implicates important state interests" and "provide[s] an adequate opportunity to raise constitutional challenges." *Id.*; *see also Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011). And although the particular situation before the court involved a state-court proceeding in which Sprint was

seeking review of a state-agency decision, the Eighth Circuit proclaimed more broadly (in line with Eighth Circuit precedent) that the agency proceeding itself warranted *Younger* abstention—that is, the "IUB's order . . . constitutes a judicial proceeding that is entitled to *Younger* abstention." *Sprint*, 690 F.3d at 869.

The Eighth Circuit's sweeping view of *Younger* abstention cannot be reconciled with this Court's understanding of that doctrine. Given that States could be said to have an "important interest" in almost *all* proceedings before their own specialized regulatory agencies, the Eighth Circuit's rule taken to its logical limit would effectively require federal courts to abstain during the pendency of almost *any* state administrative proceeding. Such a result would not only conflict with this Court's repeated admonitions that *Younger* abstention is the "exception, not the rule," *New Orleans Public Service, Inc. v. Council of City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 359 (1989) (internal quotation marks omitted), but it also (if accepted) would threaten to foreclose federal judicial review for the numerous industries subject to dual federal and state regulatory regimes. Regulated entities in industries such as telecommunications, electricity, and oil and gas (to name a few) frequently find it necessary to police the line between federal and state authority to which they are subject by challenging state action as preempted by federal law. Currently, those entities are generally free to take such claims to federal court. Under the Eighth Circuit's rule, however, the doors of the federal courthouse would be slammed shut whenever a regulated entity commences a state administrative proceeding.

Nor would the expansive effects of the Eighth Circuit's novel approach to *Younger* abstention abate once the administrative proceeding ends. Although this Court has specifically reserved judgment on the issue, the Eighth Circuit has held that, upon the conclusion of proceedings before a state agency, *Younger* abstention requires parties to exhaust all state appellate remedies before seeking to file suit in federal court. *See, e.g.*, *Hudson*, 663 F.3d at 988 (requiring "exhaustion of . . . state appellate remedies," including "administrative, circuit court, and appellate review"). In other words, the Eighth Circuit's approach to *Younger* means that a private party that commences a state administrative proceeding will not be free to bring a related proceeding in federal court until the administrative proceeding has concluded and all state appellate options—including potentially state circuit-court, appellate-court, and supreme-court review—have been exhausted.

This Court's *Younger* doctrine does not support using the mere pendency of a state remedial proceeding at any (let alone every) stage as a basis for a sweeping denial of access to a federal forum for resolving federal-law issues. This Court should reverse the Eighth Circuit's ruling and make clear that *Younger* abstention is warranted only when a related state proceeding is coercive in nature. If, however, the Court is inclined to affirm, it should make clear that *Younger* applies here only because the federal plaintiff both initiated the original state administrative proceeding and voluntarily sought to appeal the outcome of that proceeding through the state courts.

ARGUMENT

In its decision below, the Eighth Circuit held that *Younger* required a federal district court to abstain during the pendency of a purely remedial state

proceeding. The State of Iowa did not initiate enforcement proceedings against Sprint in front of a state agency or in state court. Instead, Sprint *itself* voluntarily filed a complaint before the IUB. *See* Pet. App. 64a. It did so, moreover, to help resolve a commercial disagreement with another private party. *See id.* at 64a-65a. Whatever else might qualify as a "coercive" state proceeding for *Younger* purposes, it surely cannot include a case where two private parties voluntarily bring a dispute before a state agency. Indeed, even the Eighth Circuit did not dispute that the underlying state proceeding here was "remedial, rather than coercive," in nature. *Sprint*, 690 F.3d at 868.[2]

Because it applies *Younger* abstention to remedial state proceedings, the Eighth Circuit's holding conflicts with this Court's cases, the purposes underlying the *Younger* doctrine, and the views of every other Court of Appeals to address the issue. Embracing the Eighth Circuit's novel approach to *Younger* abstention, moreover, would have significant implications for federal-judicial-review rights of businesses in numerous

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[2] Although the Eighth Circuit stated below that the IUB's order "attempts to enforce liabilities based on present facts and existing laws," *Sprint*, 690 F.3d at 869, that characterization was made in the context of the lower court holding that the IUB's proceeding was judicial, rather than legislative, in nature, under the analysis this Court applied in *NOPSI*. *Id.* at 868 (explaining that *NOPSI* "distinguished between state judicial inquiries and legislation, noting that only judicial proceedings are entitled to *Younger* abstention"). The Eighth Circuit never disputed that while the IUB's proceeding was judicial in nature, it nevertheless was a "remedial" judicial proceeding that had been initiated by Sprint. *See id.*

sectors of American industry that are subject to dual state and federal regulatory regimes.

A. The Eighth Circuit's Holding Is Inconsistent With This Court's Cases Defining The *Younger* Doctrine.

By holding that *Younger* abstention was warranted during the pendency of remedial state proceedings, the Eighth Circuit reached a result that cannot be squared with decades of this Court's precedents construing the *Younger* doctrine. In the more than 40 years since *Younger* was decided, this Court has applied *Younger* abstention *only* in the context of coercive state proceedings. *Younger* itself involved the archetypal state coercive action: a criminal prosecution. And although the Court's "concern for comity and federalism has led [it] to expand the protection of *Younger* beyond state criminal prosecutions," *NOPSI*, 491 U.S. at 367-68, in the process of extending the doctrine, the Court has consistently limited *Younger* to coercive actions brought by the State for the purpose of enforcing its own laws. Thus, the Court has held that *Younger* abstention is required in the context of state-initiated civil-enforcement proceedings to compel closure of a theatre showing obscene films, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), recover fraudulently obtained welfare payments, *Trainor v. Hernandez*, 431 U.S. 434 (1977), and assume state custody over abused children, *Moore v. Sims*, 442 U.S. 415 (1979).

In each instance, the Court's reasoning was unmistakably tied to the coercive nature of the relevant state proceeding. The Court thus noted that the State was a party to the underlying civil proceeding. *See Moore*, 442 U.S. at 423 ("[T]he State here was a party to the state proceedings."); *Trainor*, 431 U.S. at 444 ("[T]he fact remains that the State was a party to the

suit in its role of administering its public-assistance programs."); *Huffman*, 420 U.S. at 604 ("The State is a party to the Court of Common Pleas proceeding."). And it emphasized that the State was acting as a sovereign to secure compliance with its laws, typically in a field closely related to the State's criminal laws. *See Moore*, 442 U.S. at 423 (proceeding was "in aid of and closely related to criminal statutes") (internal quotation marks omitted); *Trainor*, 431 U.S. at 444 (State "had the option of vindicating these policies through criminal prosecutions"); *Huffman*, 420 U.S. at 604-05 (proceeding was "more akin to a criminal prosecution than are most civil cases" and was brought to "obtain compliance with precisely the standards which are embodied in [the] criminal laws"). *Younger* abstention, in other words, is intended to prevent the "disruption of suits by the State in its sovereign capacity." *Trainor*, 431 U.S. at 446.

In contrast to these cases, which applied *Younger* to coercive civil-enforcement proceedings, no decision of this Court has ever applied *Younger* abstention where an ongoing state proceeding involved a private party's efforts to obtain a *remedy* from a state judicial or administrative body for a past wrong—whether the remedy was sought against the State itself or against another private party.[3] The lack of precedent over more than 40 years is itself telling.

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[3] The Court has also extended *Younger* to "challenges to the processes by which the State compels compliance with the judgments of its courts." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987) (enforcement of state-court judgment); *see also Juidice v. Vail*, 430 U.S. 327 (1977) (enforcement of contempt order). Such cases are limited to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts'

Distinguishing between coercive and remedial actions is particularly important in the context of state-administrative proceedings. As the Court recognized in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, limiting *Younger* to coercive proceedings initiated by the State is critical to squaring the *Younger* doctrine with the general rule that a party need not exhaust state administrative remedies before bringing a federal lawsuit. 477 U.S. 619, 627 n.2 (1986) (explaining that *Younger* abstention applied because, *inter alia*, "the administrative proceedings here are coercive rather than remedial"); *see also Patsy v. Board of Regents*, 457 U.S. 496, 509 (1982) (holding that plaintiffs bringing § 1983 claims generally are not required to exhaust state remedies before bringing suit in federal court); *Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir. 2010) (former employee free to pursue wrongful termination claims simultaneously "in federal and state proceedings"). Thus, the Court has held that *Younger* abstention applies to state-initiated disciplinary proceedings against an attorney, *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 437 (1982) (explaining that ethics committees "act as the arm of the [Supreme Court of New Jersey] in performing the function of receiving and investigating complaints and holding hearings"), and to a state agency's administrative action against a private school that allegedly engaged in employment discrimination,

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ability to perform their judicial functions." *NOPSI*, 491 U.S. at 368. Given that they fundamentally involve a State's capacity to ensure enforcement of the judgments or orders of its courts, they provide no basis for holding that *Younger* applies to purely remedial state proceedings, such as the proceedings Sprint initiated before the IUB in this case.

Dayton Christian Schools, 477 U.S. at 627-28. In both cases, an arm of the State was seeking to enforce state laws. The Court has never interpreted *Younger*, however, to require a federal court to abstain in deference to a related state administrative proceeding initiated by a private party to obtain resolution of a private commercial dispute.

B. The Eighth Circuit's Holding Is Inconsistent With The Rationales Underpinning *Younger*.

The principles underlying the *Younger* doctrine also provide no support for requiring federal courts to abstain in deference to state remedial proceedings. To the contrary, the two rationales invoked by the Court in *Younger* necessarily limit that abstention doctrine to situations where a State's sovereign interests in enforcing its laws are at stake.

The most "vital consideration" animating *Younger* is the "notion of comity" in our federal system—the idea that "States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. Those considerations are at their zenith when a State institutes a coercive action to enforce its laws. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 49 (1986) ("This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief."); *Trainor*, 431 U.S. at 444 (recognizing a strong State interest in avoiding "interference by a federal court with an ongoing civil enforcement action"). Where a private party voluntarily invokes a State's administrative or judicial system to obtain a remedy (even in parallel with federal remedies) the State has no stronger claim

that its agencies or courts should be the venue for the party's complaint than do the federal courts. Indeed, that is particularly the case where (as here) the proceeding involves a dispute between two private parties and raises important questions of federal law. In such a case, the settled principle that applies is that a federal court has a "virtually unflagging obligation . . . to exercise the jurisdiction given" to it, *Colorado River*, 424 U.S. at 817, and the pendency of a parallel state proceeding is no bar to the federal action. In other words, the State's mere role as a decisionmaker in a remedial action (as opposed to its role as a sovereign seeking to enforce its own laws) does not trigger the comity rationale of *Younger*.

The second rationale underpinning *Younger*—traditional constraints on the authority of courts of equity to enjoin criminal prosecutions or enforcement proceedings—also provides no support for applying *Younger* to remedial state proceedings. As this Court has explained in a case involving concurrent state and federal proceedings, "[i]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Colorado River*, 424 U.S. at 813-14 (internal quotation marks omitted). Instead, *Younger* leaned heavily on the principle that courts of equity "should not act to restrain a *criminal* prosecution." 401 U.S. at 43 (emphasis added). Although that principle might apply to a civil or administrative proceeding "which in important respects is more akin to a criminal prosecution than are most civil cases," *Huffman*, 420 U.S. at 604, it has no application where (as here) the underlying state proceeding is remedial in nature.

Finally, applying *Younger* to remedial state proceedings would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368. As this Court has frequently warned, *Younger* abstention is "the exception, not the rule." *Id.* at 359 (internal quotation marks omitted); *see also County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959) ("The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."). If *Younger* required federal courts to abstain during the pendency of both coercive *and* remedial state proceedings, there would be few (if any) state proceedings to which *Younger* did not apply. Such a sweeping understanding of *Younger* abstention would be inconsistent with the general rule that "as between state and federal courts ... the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River*, 424 U.S. at 817 (internal quotation marks omitted). Although *Younger* imposes exceptions to that general rule, it does not "remotely suggest that every proceeding between a State and a federal plaintiff justifies abstention." *Moore*, 442 U.S. at 423 n.8 (internal quotation marks omitted).

C. The Eighth Circuit's Understanding Of *Younger* Is An Outlier Among The Courts Of Appeals.

By extending *Younger* to remedial state proceedings, the Eighth Circuit adopted an approach to *Younger* abstention that the great majority of the lower courts have rejected. Every Court of Appeals that has addressed the issue, other than the Eighth Circuit, has held that *Younger* abstention is warranted only when a

related state proceeding is coercive in nature. *See, e.g.*, *Guillemard–Ginorio v. Contreras–Gomez*, 585 F.3d 508, 522 (1st Cir. 2009); *Univ. Club v. City of New York*, 842 F.2d 37, 42 (2d Cir. 1988); *O'Neill v. City of Philadelphia*, 32 F.3d 785, 791 n.13 (3d Cir. 1994); *Moore v. City of Asheville*, 396 F.3d 385, 394-95 (4th Cir. 2005); *Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir. 2010); *Nader v. Keith*, 385 F.3d 729, 732 (7th Cir. 2004); *Brown ex. rel. Brown v. Day*, 555 F.3d 882, 890 (10th Cir. 2009).

As those courts have recognized, "*Younger* originated in situations where federal involvement would block a state's efforts to enforce its laws," and the rationale behind the decision limits it to such situations. *Brown*, 555 F.3d at 893. As a result, there is a critical distinction "between cases where the state proceeding involves the state coercively enforcing its laws and cases where state proceedings involve the federal plaintiff seeking a remedy for a past wrong." *Id.* at 884; *see also id.* at 892 (a coercive proceeding involves a "state's proactive enforcement of its laws"); *City of Asheville*, 396 F.3d at 393 (in finding action coercive, emphasizing that the City was a party to the proceeding and was seeking to "enforce its substantive policies"); *Nader*, 385 F.3d at 732 (explaining that *Younger* applies when "the state has *instituted* a criminal, disciplinary, or other enforcement proceeding against [the federal plaintiff]") (emphasis added); *Planned Parenthood League v. Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989) (*Younger* did not apply where there was no "state-initiated proceeding, criminal or civil"). Participation by an arm of the State in an effort to enforce state law is crucial because it triggers the essential concerns animating the *Younger* doctrine—namely, preventing federal-court interference "with the

State's interest in enforcing its substantive laws as well as its interest in enforcing those laws through available administrative proceedings and in its own courts." *City of Asheville*, 396 F.3d at 395; *see also Trainor*, 431 U.S. at 442 (*Younger* prevents "interference by the federal courts with legitimate state efforts to enforce state laws"). Other proceedings, in contrast, "fill the 'remedial' category," *Brown*, 555 F.3d at 890, and do not involve similar concerns for interfering with a State's "proactive enforcement of its laws," *id.* at 892.

Although it acknowledges that "[o]ther circuits" have limited *Younger* abstention to coercive state proceedings, the Eighth Circuit nonetheless has held that the distinction between coercive and remedial actions is not "outcome determinative." *Hudson*, 663 F.3d at 987; *Sprint*, 690 F.3d at 866, 868 (same). Instead, in the Eighth Circuit's view, *Younger* abstention is warranted where there is *any* pending state proceeding—without regard to whether is properly characterized as "coercive" or "remedial"—so long as the proceeding (i) is "ongoing;" (ii) "implicates an important state interest;" and (iii) "provides an adequate opportunity to raise constitutional challenges." *Hudson*, 663 F.3d at 987; *Sprint*, 690 F.3d at 867 (same).

That cannot be all that is required for *Younger* abstention to apply. This Court has repeatedly warned that *Younger* does not require abstention whenever a related state proceeding is pending. *See, e.g.*, *Pennzoil*, 481 U.S. at 14 n.12 ("Our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court."); *Moore*, 442 U.S. at 423 n.8 ("[W]e do not remotely suggest that every proceeding between a State and a federal plaintiff justifies abstention.") (internal

quotation marks omitted). Instead, it has emphasized that *Younger* applies only to certain "type[s] of proceeding[s]." *NOPSI*, 491 U.S. at 367. But under the Eighth Circuit's test, *Younger* abstention would be warranted for almost *any* type of ongoing state proceeding raising issues related to a pending federal court action. A State, after all, can almost *always* be said to have an "important . . . interest" in matters pending in its own courts and administrative bodies. *Hudson*, 663 F.3d at 987, 989. And the availability of state-court review of a lower court or agency decision typically satisfies the requirement that there be an "adequate opportunity" to raise constitutional challenges. *Id.*; *see also Dayton Christian Schools*, 477 U.S. at 629 (explaining that, for *Younger* purposes, it is "sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding"). Embracing the Eighth Circuit's approach, in short, would turn *Younger* abstention from an "extraordinary and narrow exception," *County of Allegheny*, 360 U.S. at 188-89, into a matter of routine practice.

D. Adopting The Eighth Circuit's Approach To *Younger* Would Frustrate Federal Judicial Review Of Federal Challenges To State Agency Action.

The Eighth Circuit's rule has potentially significant implications in the context of ongoing state administrative proceedings. In both the decision below and in several of its past decisions, the Eighth Circuit required federal courts to abstain on *Younger* grounds in deference to ongoing state administrative proceedings that had been initiated by private parties. *See Sprint*, 690 F.3d at 869 ("The IUB's order . . . constitutes a judicial proceeding that is entitled to

Younger abstention."); *Hudson*, 663 F.3d at 986 (holding that "abstention is appropriate in administrative proceedings like Hudson's"); *Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475, 479-81 (8th Cir. 1998) (proceedings before a city planning commission in which a private party was seeking approval to open an exotic dancing club); *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1145 (8th Cir. 1990) (proceedings before the Nebraska Director of Insurance in which a private party was seeking approval to acquire common stock in an insurance company).[4] Indeed, nothing in the Eighth Circuit's test would prevent *Younger* abstention from applying in practice to *all* ongoing state-agency proceedings.

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[4] At certain points, the decision below is less than clear about whether it was Sprint's initiation of proceedings before the IUB that triggered *Younger* abstention or, alternatively, whether it was Sprint's decision to file a state-court petition for review that triggered *Younger* abstention. *See Sprint*, 690 F.3d at 867 ("The parallel state court proceeding . . . has a bearing on our abstention analysis."). The procedural posture of the case required the court to consider solely whether Sprint's state-court petition for review warranted application of *Younger*. Nevertheless, the court announced more broadly that it was the administrative proceeding that warranted *Younger* abstention: "The IUB's order . . . constitutes a judicial proceeding that is entitled to *Younger* abstention." *Id.* at 869; *see also id.* at 867 (explaining that interference warranting *Younger* abstention "would result from a federal court's declaration of how a *state utilities board* should interpret its state's laws") (emphasis added). The district court also made it clear that it viewed the IUB proceeding as triggering *Younger* when it explained that that Sprint's subsequent petition for review in state court was "an appeal from the IUB orders" that was part of an "uninterruptible process under the *Younger* doctrine." Pet. App. 24a.

The Eighth Circuit's reasoning has few logical limits regarding the kinds of state proceedings that could be subject to *Younger* abstention. In this case, Sprint itself initiated the underlying state proceedings. But the Eighth Circuit's lodestar for applying *Younger*—namely, whether a state has an "important interest" in the ongoing proceeding—would seem to be unaffected by which party initiated the proceedings. The logical extension of the Eighth Circuit's reasoning would therefore suggest that even state proceedings started by *another party* would trigger *Younger* abstention and would thus deprive a defendant involuntarily haled before a state agency (or other state tribunal) of the ability to resort to federal court to present any federal claims.

Nor under the Eighth Circuit's rule could a party assure itself a federal forum simply by filing a federal-court action before a state administrative proceeding had commenced. Federal courts must abstain when a proceeding to which *Younger* applies is brought "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). Under the Eighth Circuit's rule, therefore, a defendant seemingly could obtain an automatic stay of a federal action simply by quickly filing a related proceeding in a state agency or before a state court.

The Eighth Circuit's expansive approach to *Younger*, if adopted nationwide, could have significant ramifications for the numerous sectors of American industry that are subject to dual state and federal regulatory regimes. Businesses in these industries frequently resort to federal court to vindicate their federal constitutional and statutory rights when state regulators violate federal law. Today, dual regulatory

regimes affect myriad segments of the economy, including (to name just a few) natural gas production and transport under the Natural Gas Act and Natural Gas Policy Act, *see, e.g., Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 506 (1989) ("The natural gas industry is subject to interlocking regulation by both federal and state authorities."); electric utilities under the Federal Power Act and Public Utility Regulatory Policies Act, *see, e.g., Freehold Cogeneration Assocs. v. Board of Regional Commissioners*, 44 F.3d 1178, 1182 (3d Cir. 1995); and telecommunications, *see, e.g. Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 360 (1986) ("The [Communications] Act establishes, among other things, a system of dual state and federal regulation over telephone service."). These industries, moreover, account for a significant amount of American economic activity. *See, e.g.*, U.S. Department of Commerce, Bureau of Economic Analysis, http://www.bea.gov/regional/downloadzip.cfm (noting 2012 GDP of telecommunications industry at $363 billion or 2.4% of private sector economic activity and utilities at $304 billion or 2.03% of private sector economic activity, and 2011 GDP of oil and gas extraction at $174 billion or 1.16%).

Entities doing business in those sectors frequently may find themselves before state administrative agencies or courts in proceedings that implicate important federal claims, including claims that involve demarcating the line between federal and state authority. *See, e.g., Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002) (telecommunications company challenging legality under the Telecommunications Act of state utility commission's order to pay reciprocal compensation).

Courts have long held that entities in these heavily regulated industries can obtain federal-court review of their federal claims, even while they also have a simultaneous state-court proceeding addressing the same claims. *See, e.g.*, *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1117 (3d Cir. 1986) (natural gas companies could challenge order of Pennsylvania Public Utility Commission in federal court while simultaneously challenging the order in state court). In many instances, such a proceeding might be instituted to resolve a dispute between two regulated entities—much like the underlying dispute about access charges between Sprint and Windstream in this case. *See, e.g.*, *Freehold Cogeneration Assocs.*, 44 F.3d at 1182 (dispute between electricity generators concerning modification of contract). But such a proceeding would not prevent one party from resorting to federal court to secure an answer to federal-law questions affecting the dispute. *See, e.g.*, *id.*

Under the Eighth Circuit's rule, however, once *any* party initiates a state-administrative proceeding—apparently including a contractual counterparty or competitor of a regulated entity—*all* issues of federal law must be litigated solely before the state agency. The Eighth Circuit makes no exception to that rule no matter how complex the issues of federal law may be, no matter how important they may be to the functioning of an overall federal regulatory policy, and no matter how much they may cry out for resolution by the expert federal agency in the field.

The underlying merits question in this case, for example, concerns a pure issue of federal statutory interpretation—namely, whether VoIP calls qualify as an "information service" under the Telecommunications

Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. That question clearly implicates "a pervasive federal regulatory regime" and involves "strong federal interest[s]." *Sprint*, 690 F.3d at 868 (internal quotation marks omitted). The Eighth Circuit nonetheless compelled Sprint to litigate that issue in state proceedings. *Id.*; *see also Hudson*, 663 F.3d at 988 (requiring *Younger* abstention and exhaustion of state remedies even though a state administrative decision on Medicaid "involve[d] a pervasive federal regulatory regime"). Indeed, the Eighth Circuit compelled Sprint to litigate that issue in state proceedings even though Sprint itself had initiated and framed the state proceeding and had *not* presented the federal question to the state agency for a decision. *See* J.A. 4a-5a. Sprint's complaint before the IUB was limited purely to the procedural question whether Sprint could withhold payment on disputed charges until the dispute had been resolved in a separate proceeding before the Federal Communications Commission.

Moreover, the Eighth Circuit's expansive understanding of *Younger* would actually undermine the values of federalism and respect for state processes that are at the heart of the *Younger* doctrine. An entity operating in an area of dual state-and-federal regulation often has a choice as to whether to file suit directly in federal court, or to first seek relief before a state administrative body. In this case, for example, nothing would have barred Sprint from seeking declaratory relief directly from a federal district court, without bringing any aspect of its dispute with Windstream to the IUB. If the consequence of invoking state-administrative channels is that a party also necessarily forfeits the ability to secure a federal forum to address any related federal issues, then regulated

parties might well avoid state-administrative proceedings at all costs. "With firms thus induced to avoid the state regulatory process, the principles of federalism would be affronted rather than protected." *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1051 (7th Cir. 1990), *vacated on other grounds by* 499 U.S. 933 (1991).

Beyond the effects noted above, the practical implications of the Eighth Circuit's rule are potentially even broader in light of the exhaustion requirements that can flow from the finding that a particular state proceeding merits *Younger* abstention. This Court has expressly reserved judgment on whether an administrative proceeding to which *Younger* applies can be challenged directly in federal court after the administrative proceeding concludes, or whether parties must first exhaust state judicial review before resorting to federal court. *See NOPSI*, 491 U.S. at 369 n.4. Nonetheless, every Court of Appeals to address the question (except the Fifth Circuit) has held that, when *Younger* abstention to a coercive state administrative proceeding is warranted, a party must exhaust state appeals before seeking to challenge the state-agency decision in federal court. *See, e.g., City of Ashville*, 396 F.3d at 388; *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27, 35 (1st Cir. 2004); *Majors v. Engelbrecht*, 149 F.3d 709, 712-13 & n.3 (7th Cir. 1998); *O'Neill*, 32 F.3d at 790-91. *But see Thomas v. Texas Bd. of Med. Exam'rs*, 807 F.2d 453, 456 (5th Cir. 1987). The Eighth Circuit has reached the same conclusion. *See, e.g., Hudson*, 663 F.3d at 988 (requiring "exhaustion of state appellate remedies"); *McCartney*, 896 F.2d at 1144 ("[A] party cannot avoid *Younger* by choosing not to pursue available state appellate remedies.").

If the Eighth Circuit's expansive approach to *Younger* were upheld and combined with that

exhaustion requirement, the consequences would be substantial. Combining both rules would mean that once any kind of state administrative proceeding is commenced, a federal court presented with a related case would be *required* stay its hand not only while the administrative proceeding is ongoing, but also unless and until all state appellate options have been exhausted—including potentially state circuit-court, appellate-court, and supreme-court review.

Simply by filing a state administrative action, therefore, putative defendants in a federal lawsuit could force parties to litigate their federal claims solely before state tribunals. That would frustrate an aggrieved party from securing a federal court hearing for a claim that a state agency misinterpreted or violated federal law. Once the mandatory state-appellate review has concluded, principles of *res judicata* might well preclude a new federal lawsuit raising the same claims. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."). Under that scenario, the only avenue for obtaining federal review would be a petition to this Court for a writ of *certiorari* to review the decision of the highest state court in which review could be had. Given the low likelihood of securing a writ of *certiorari* in most cases, however, adoption of the Eighth Circuit's approach could significantly alter judicial review of federal-law issues in industries under dual federal and state regulatory regimes. In any case in which a party saw an advantage to bringing a dispute before a state administrative agency, there would be a race to filing,

because filing before a state agency would effectively bar the other party from resorting to federal court.

Thus, taken to its logical limits, the Eighth Circuit's ruling foreshadows a world in which strategic behavior could inhibit a regulated entity from obtaining federal court review of federal issues—not because state agencies themselves are pursuing proceedings to enforce *state* law in areas of dual regulatory authority, but rather because opponents see an advantage in selecting a state forum. That plainly is not the system this Court envisioned in its decisions explaining the contours of the *Younger* doctrine.

E. Any Affirmance Should Be Limited To The Specific Circumstances Of This Case.

Because the underlying state proceedings were initiated by Sprint and were remedial in nature, the Eighth Circuit erred in holding that *Younger* abstention was warranted. Sprint had every right to bring a federal lawsuit challenging the outcome of the IUB's decision. Sprint should not be punished, moreover, because it opted to seek review in *both* federal *and* state court. Parties are generally free to simultaneously pursue remedies in state and federal court. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005) ("This Court has repeatedly held that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.") (internal quotation marks omitted); *Devlin*, 594 F.3d at 895-96 (*Younger* abstention not appropriate even though plaintiff simultaneously pursued relief "in federal and state proceedings"); *Nader*, 385 F.3d at 731-32 (*Younger* abstention not appropriate even though plaintiff had "also sued in state court" because a party is free to "pursu[e] parallel remedies" against state agency

decision). And the state of Eighth Circuit law at the time Sprint sought review made it prudent to file proceedings in both jurisdictions.[5]

If, however, the Court nonetheless concludes that *Younger* abstention was appropriate in this case, it should limit its holding to the particular facts presented here. The facts of this case required the Eighth Circuit to consider solely whether Sprint's state-court petition for review, filed on the same day as Sprint's federal-court action, warranted *Younger* abstention. There was no need for the Eighth Circuit to declare that "[t]he IUB's order . . . constitutes a judicial proceeding that is entitled to *Younger* abstention." *Sprint*, 690 F.3d at 869. Thus, this Court should make clear that any application of *Younger* in this case is warranted only because (i) Sprint had initiated a state administrative proceeding of its own accord, thereby initially choosing a state administrative forum; and (ii) Sprint chose to appeal the outcome of that proceeding within the state-

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[5] At the time it sought to challenge the IUB's determination, Sprint faced a dilemma. If, on the one hand, Sprint challenged the IUB's decision only in federal court, existing Eighth Circuit precedent made it likely that the district court would have been required to abstain on *Younger* grounds because Sprint had not exhausted its state-court remedies. *See McCartney*, 896 F.2d at 1144 ("[A] party cannot avoid *Younger* by choosing not to pursue available state appellate remedies."). Moreover, by the time Sprint could have obtained a ruling on the *Younger* issue, its window for seeking state-court review would have closed. *See* Iowa Code § 17A.19(3) (giving parties thirty days to seek judicial review of state administrative action). If, on the other hand, Sprint challenged the IUB's determination only through state appellate avenues, principles of *res judicata* could have forever denied Sprint a federal forum (unless this Court chose to review the decision of the highest state court to which Sprint could have appealed).

court system. Even if *Younger* applies on those facts, it should not apply where a federal plaintiff has been compelled to participate in state administrative proceedings by a third party and has chosen to challenge any state decision solely in federal court.

The Court should also make clear that this case presents no opportunity to address whether a party is required to exhaust state remedies after concluding a state administrative proceeding. This Court explicitly left that question open in *NOSPI*. *See* 491 U.S. at 369 n.4 (explaining that the Court has "never squarely faced the question" whether "an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final"). Because Sprint voluntarily chose to pursue state-court remedies, this Court need not decide whether Sprint was *required* to exhaust state appellate remedies before challenging the IUB's decision in federal court.

CONCLUSION

For the foregoing reasons, the Court should hold that *Younger* abstention is warranted only when a related state proceeding is coercive in nature. Because that necessary prerequisite for *Younger* abstention is not met here, the Court should reverse and remand for proceedings consistent with its opinion.

July 3, 2013

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AMICUS CURIAE BRIEF

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BRIEFS

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In The
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,

Petitioner,

v.

ELIZABETH S. JACOBS, *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eighth Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is, instead, "remedial."

TABLE OF CONTENTS

QUESTION PRESENTED i

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 3

A. Statutory and Regulatory Framework 3

B. Factual And Procedural History 7

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE FEDERAL COURTS' EXERCISE OF THE JURISDICTION THAT CONGRESS CONFERRED ENSURES THE COHERENT OPERATION OF A COMPLEX FEDERAL REGULATORY SCHEME. 13

A. Federal Judicial Review Provides Critical Oversight Of State Agencies' Compliance With The Telecommunications Act. 13

B. Federal Courts Routinely Review State Regulatory Action For Compliance With The Telecommunications Act. 16

II. ABSTENTION IS A NARROW EXCEPTION TO THE FEDERAL COURTS' VIRTUALLY UNFLAGGING OBLIGATION TO EXERCISE THE JURISDICTION THAT CONGRESS ASSIGNS. 21

A. Abstention Is Meant To Be A Rare Exception. 21

B. Abstention Is Only Appropriate To Avoid Undue Interference With Paramount State Interests That Lie At The Core Of A Case. ... 22
1. Pullman Abstention Does Not Apply. 23
2. Burford Abstention Is Unwarranted. 24
3. Younger Abstention Is Inappropriate. 25
4. NOPSI Does Not Support The Ruling Below. 28
C. Sprint's Protective State Action Provides No Basis For Abstention..... 30
III. AFFIRMANCE WOULD ALLOW THE ABSTENTION EXCEPTION TO SWALLOW THE FEDERAL JURISDICTIONAL RULE..... 33
A. Comity And Federalism Interests Are At Their Nadir When State Agencies Have Chosen to Act As Deputized Federal Regulators. 33
B. Affirmance Would Eviscerate The Congressionally Conferred Right To Federal Judicial Review. 35
CONCLUSION 37

TABLE OF AUTHORITIES

CASES:

Alabama Pub. Serv. Comm'n. v. Southern Ry. Co.,
341 U.S. 341 (1951) 31

Alhambra-Grantfork Tel. Co. v. Illinois Commerce Comm'n,
832 N.E.2d 869 (Ill. App. Ct. 2005) 19

Alleghany Corp. v. Haase,
896 I .2d 1046 (7th Cir. 1990) 25, 26

AT&T Corp. v. Iowa Utils. Bd.,
525 U.S. 366 (1999) ..... *passim*

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 2

AT&T v. Pennsylvania Pub. Util. Comm'n,
737 A.2d 201 (Pa. 1999) 18, 19

Bellsouth Telecomms., Inc. v. Sanford,
494 F.3d 439 (4th Cir. 2007) 4

BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n,
669 F.3d 704 (6th Cir. 2012) 16

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 24

City of Arlington, Tex. v. FCC,
133 S. Ct. 1863 (2013) 2

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 21

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) ..... *passim*

CTIA-The Wireless Ass'n v. City and County of San Francisco, Cal.,
494 F. App'x 752 (9th Cir. 2012) 3

Dillon v. Alleghany Corp.,
499 U.S. 933 (1990) 26

Ex parte Young,
209 U.S. 123 (1908) 15

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 19

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,
545 U.S. 308 (2005) 19

Gregory v. Ashcroft,
501 U.S. 452 (1991) 34

Gunn v. Minton,
133 S. Ct. 1059 (2013) 36

Hawaii Housing Auth. v. Midkiff,
467 U.S. 229 (1984) 23, 25

Hicks v. Miranda,
422 U.S. 332 (1975) 36

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975) 26

Illinois Bell Tel. Co. v. Box,
548 F.3d 607 (7th Cir. 2008) 16, 17

Illinois Bell Tel. Co. v. Globalcom, Inc.,
No. 03 C 0127, 2003 WL 21031964 (N.D. Ill. May 6, 2003) 17

Illinois Bell Tel. Co. v. Illinois Commerce Comm'n,
921 N.E.2d 1147 (Ill. App. Ct. 2009) 18

Illinois Bell Tel. Co. v. Worldcom Techs., Inc.,
179 F.3d 566 (7th Cir. 1999) 4

Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n,
810 N.E.2d 1179 (Ind. Ct. App. 2004) 18

Juidice v. Vail,
430 U.S. 327 (1977) 27

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 4

Massachusetts Delivery Ass'n v. Coakley,
671 F.3d 33 (1st Cir. 2012) 26, 27

McClellan v. Carland,
217 U.S. 268 (1910) 30

MCI Telecomms. Corp. v. Illinois Bell Tel. Co.,
222 F.3d 323 (7th Cir. 2000) 16

Middlesex Ethics Comm. v. Garden State Bar Ass'n,
457 U.S. 423 (1982) 25, 26

Moore v. Sims,
442 U.S. 415 (1979) 26

National Cable v. Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 7

New Orleans Pub. Serv., Inc. v. Council of New Orleans,
491 U.S. 350 (1989) ..... *passim*

Nixon v. Missouri Municipal League,
541 U.S. 125 (2004) 34, 35

Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,
477 U.S. 619 (1986) 26

Pacific Bell v. PAC-West Telecomms., Inc.,
325 F.3d 1114 (9th Cir. 2003) 16, 24

Palmore v. United States,
411 U.S. 389 (1973) 18, 19

Pennzoil Co. v. Texaco, Inc.,
481 U.S. 1 (1987) 27

PrimeCo Pers. Commc'ns, Ltd. v. City of Mequon,
352 F.3d 1147 (7th Cir. 2003) 17

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) ..... *passim*

Qwest Corp. v. Minnesota Pub. Utils. Comm'n,
684 F.3d 721 (8th Cir. 2012) 17

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941) 23

Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n,
461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd*
530 F.3d 676 (8th Cir. 2008) 17

Southwestern Bell Tel., L.P. v. Moline,
333 F. Supp. 2d 1073 (D. Kan. 2004) 17

Sprint PCS Assets LLC v. City of La Cañada Flintridge,
448 F.3d 1067 (9th Cir. 2006) 17

Steel Co. v. Citizens for Better Env't,
523 U.S. 83 (1998) 14

Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.,
130 S. Ct. 1758 (2010) 2

T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield,
691 F.3d 794 (6th Cir. 2012) 17

T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County,
546 F.3d 1299 (10th Cir. 2008) 17

T-Mobile Ne. LLC v. City Council of Newport News, Va.,
674 F.3d 380 (4th Cir. 2012) 17

Talk America v. Michigan Bell Tel. Co.,
131 S. Ct. 2254 (2011) 16

Town of Lockport, New York v. Citizens for Cmty. Action at Local Level, Inc.,
430 U.S. 259 (1977) 31

Trainor v. Hernandez,
431 U.S. 434 (1977) 26

Verizon Commc'ns, Inc. v. FCC,
535 U.S. 467 (2002) 4

Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland,
535 U.S. 635 (2002) ..... *passim*

Younger v. Harris,
401 U.S. 37 (1971) ..... *passim*

CONSTITUTION AND STATUTES:

U.S. CONST. AMEND. I 3

U.S. CONST. AMEND. XI 15

47 U.S.C.
§ 152(b) 7
§ 153(24) 7
§ 252(b) 6
§ 252(c) 5
§ 252(e) 5
§ 252(e)(5) 5, 35
§ 252(e)(6) 6
§ 253 34
§ 332(c)(3)(A) 3, 6
§ 332(c)(7) 6
§ 332(c)(7)(B)(v) 7, 17, 35

Stored Communications Act, 18 U.S.C.
§ 2701, *et seq.* 2

Telecommunications Act of 1996, Pub. L. No.
104-104, 110 Stat. 56 3

OTHER AUTHORITIES:

H.R. Rep. No. 459, 104th Congress, 2d Sess. 1
(Jan. 31, 1996) 19

H.R. Rep. No. 111, 103d Congress, 1st Sess.
211 (May 25, 1993) 6

In the Matter of Connect America Fund,
26 FCC Rcd. 17663 (Nov. 18, 2011) 7, 8

In the Matter of Numbering Policies for Modern Commc'ns,
28 FCC Rcd. 5842 (Apr. 18, 2013) 8

In The
Supreme Court of the United States

No. 12-815

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, *ET AL.*,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF CTIA—THE WIRELESS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

CTIA—The Wireless Association® is an international nonprofit membership organization representing all sectors of the wireless

[1] This brief is filed with the written consent of all parties through individual letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

communications industry. CTIA advocates on behalf of wireless carriers and its other members in all spheres of government, and supports numerous cross-sector industry initiatives, coordinating efforts to educate government agencies and the public about wireless industry issues.[2]

CTIA has previously filed briefs with this Court in a range of cases presenting issues of importance to the wireless industry. *See, e.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

CTIA also appears regularly before the lower courts and regulatory agencies, and frequently seeks federal judicial review of state agency actions that violate federal law. *See, e.g.*, Compl., *CTIA-The Wireless Ass'n v. Telecomms. Regulatory Bd. of P.R.*, No. 12-cv-01104 (D.P.R. Feb. 15, 2012), ECF No. 1 (seeking declaratory judgment that the Puerto Rico Registry Act violates the Supremacy Clause and is preempted by the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*); Compl., *CTIA-The Wireless Ass'n v. Echols*, No. 13-cv-00399 (N.D. Ga. Feb. 5, 2013), ECF No. 1 (seeking declaratory judgment that Utility Rule adopted by Georgia Public Service Commission was preempted by the Communications

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[2] CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association. In 2004, the name was changed to CTIA-The Wireless Association®.

Act, 47 U.S.C. § 332(c)(3)(A)); *CTIA-The Wireless Ass'n v. City and County of San Francisco, Cal.*, 494 F. App'x 752, 753 (9th Cir. 2012) (unpublished) (affirming preliminary injunction, in CTIA's favor, against the enforcement of a city ordinance on First Amendment grounds).

CTIA and its members are concerned that the Eighth Circuit's decision, if sustained, would substantially impede their ability to enforce the uniform protections and operation of federal law in the complex federal statutory and regulatory regime that governs the telecommunications sector.

STATEMENT

A. Statutory and Regulatory Framework

1. The statutory framework in the communications industry contemplates a hybrid federal-state regime under which the ability to resolve issues of federal law in federal court provides an important backstop for regulated companies.

Congress enacted the 1996 Telecommunications Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act "fundamentally restructure[d] local telephone markets" by transforming the "long standing regime of state-sanctioned monopolies" into a competitive national market. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). As a result, the Telecommunications

Act "opened the door to competing local exchange carriers" and "inserted both the Federal Communications Commission (FCC) and the federal courts into the previously state-regulated monopoly." *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 568 (7th Cir. 1999).

In transforming the telecommunications sector from one operated by localized public monopolies to one governed by free market forces and nationwide private competition, Congress substantially reshaped the relative roles of state and federal regulators. Prior to the Telecommunications Act, telephone service was governed by "a system of dual state and federal regulation," with the FCC exercising plenary authority over interstate services, while the States retained jurisdiction over intrastate services. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

"[B]y extending the Communications Act into local competition," the 1996 Act "removed a significant area from the States' exclusive control." *AT&T*, 525 U.S. at 381 n.8. Any "continuing exercise of authority" by the States "form[ed] part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment." *Bellsouth Telecomms., Inc., v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007). To that end, Congress in the 1996 Act, "[f]or the first time," undertook "to reorganize markets," even though "that meant swallowing the traditional federal reluctance

to intrude into local telephone markets." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

2. a. Under the 1996 Act's "hybrid jurisdictional scheme," intercarrier compensation is subject to a federal regime under which state agencies set rates and access charges in accord with federal directives. *Verizon Commc'ns*, 535 U.S. at 489. The Act also invites state utility commissions to implement federal statutory provisions governing competitive access to local telephone markets. *See* 47 U.S.C. § 252(e). If the state agency declines to take on those federal regulatory functions, the FCC will assume responsibility for them. *Id.* § 252(e)(5).[3]

State regulatory commissions—or, when state agencies decline this role, the FCC—are charged with implementing various federal requirements governing local service, including, for example, (1) not prohibiting or impeding the resale of telecommunications services by competitors, (2) providing competitors fair access to rights-of-way, and (3) arranging reciprocal compensation for competitors' telecommunications traffic in accordance with federal law. 47 U.S.C. §§ 252(c), 252(e).

A party dissatisfied with a state regulator's determination may "bring an action in an appropriate Federal district court" to review the action and to

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[3] *See, e.g.*, Mem. Op. and Order, *In re Starpower Commc'ns, LLC*, 15 FCC Rcd. 11277 (Jun. 14, 2000) (No. 00-52) (FCC assumed the relinquished jurisdiction of the Virginia State Corporation Commission after the state agency declined to exercise jurisdiction over certain petitions concerning reciprocal compensation).

ensure its conformity with the governing federal law. 47 U.S.C. § 252(e)(6). Cooperative federalism principles thus permeate the telecommunications regulatory regime, under which States voluntarily implement federal mandates within areas otherwise subject to state jurisdiction. *Id.* § 252(b).

b. With respect to regulation of the wireless industry, the Telecommunications Act further circumscribed the role of state regulators. For the wireless sector, Congress specifically concluded that broad federal preemption was necessary to establish a uniform, federal regulatory framework intended "[t]o foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure* ***." H.R. Rep. No. 111, 103d Congress, 1st Sess. 211, 260 (May 25, 1993) (emphasis added).

Accordingly, for mobile services, the vast majority of state regulation is expressly preempted. For example, the statute preempts regulation of the terms of entry or rates charged by any mobile service, and allows only limited state regulation of some terms of commercial mobile services. 47 U.S.C. § 332(c)(3)(A). A State may petition the FCC for greater authority, but may only exercise whatever additional authority the FCC decision affords. *Id.* The statute, however, does preserve state authority over zoning and land use regulation with respect to the construction of facilities like cellular telephone towers. *Id.* § 332(c)(7). A party aggrieved by a zoning decision may seek relief in "any court of competent jurisdiction," state or federal. *Id.*

§ 332(c)(7)(B)(v). That is the sole aspect of state regulation of wireless operations for which Congress permitted recourse to state courts, and even then only at the choice of the aggrieved party.

B. Factual And Procedural History

1. This case concerns the regulatory treatment of "Voice over Internet Protocol" ("VoIP") calls. At issue is whether Sprint, as an originator of VoIP traffic, had to pay "access charges" to Windstream (formerly Iowa Telecom), a traditional telephone company that connects the Sprint caller to the dialed party. *See* Pet. 7.

Because the Telecommunications Act "regulates telecommunications carriers, but not information-service providers, as common carriers," *National Cable v. Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005), if VoIP calls are deemed an "information service," then they are not subject to regulation by a state utility commission, *see* 47 U.S.C. § 153(24). The rules governing intercarrier compensation for VoIP calls have been unclear. If VoIP calls were considered a "telecommunications service" and treated like other traditional telephone traffic for intercarrier compensation, then the state regulator (subject to federal law limitations) could decide whether intrastate access charges were appropriate. *See* 47 U.S.C. § 152(b); Pet. App. 3a-4a.

After this dispute arose, the FCC established a federal regime for all VoIP traffic exchanged over the Public Switched Telephone Network. *See In the Matter of Connect America Fund*, 26 FCC Rcd. 17663, 17667-17672 (Nov. 18, 2011) (order establishing a

prospective federal regime that includes all VoIP traffic exchanged over the Public Switched Telephone Network). But the FCC specifically did not address intercarrier compensation obligations for VoIP traffic for periods prior to the new regime. *Id.* at 18003, n.1874. And the FCC has not yet decided whether VoIP is an information service or a telecommunications service. *See In the Matter of Numbering Policies for Modern Commc's*, 28 FCC Rcd. 5842, 5846 n.12, 5880 n.240 (Apr. 18, 2013). Nevertheless, relevant rules and orders indicate that the FCC would treat Sprint's VoIP service as an information service. Pet. Br. 5.

2. In January 2010, Sprint filed a complaint before the Iowa Utilities Board seeking a determination that, under the terms of Windstream's tariff, it could properly dispute the access charges and withhold payment for the VoIP traffic. Pet. App. 64a. Sprint sought an answer only to the question whether the state tariff allowed such remedies, and expressly argued that the state agency lacked authority to determine the underlying federal question of whether the VoIP traffic at issue was subject to access charges or not. Pet. 10; JA4a-5a, (Compl. at ¶¶ 15, 16). When Windstream's answer withdrew the threat to stop service that had prompted Sprint to take state administrative action, Sprint withdrew its complaint. Pet. App. 65a-66a.

The Iowa Utilities Board ("Board") nevertheless went ahead and issued a 50-page decision in which it asserted authority to decide the federal-law question of whether VoIP calls are subject to access charges, and then decided that, as a matter of federal law,

Sprint owed such charges. Pet. App. 60a-145a. After the Board denied Sprint's application for reconsideration, Pet. App. 28a-59a, Sprint paid all disputed amounts. Pet. Br. 7.

3. Sprint subsequently filed suit in federal district court seeking a declaratory judgment that the Board's ruling that intrastate access charges applied to VoIP calls "conflicts with federal law because *** VoIP is an information service, and federal law preempts state regulation of information services." JA6a (Compl. at ¶ 21). Sprint also sought injunctive relief and a declaration that the Board's order "violates federal law and thus is invalid to the extent that it purports to determine whether Sprint has an obligation to pay intrastate access charges for VoIP traffic." JA9a (prayer for relief).

Sprint later filed a protective action in state court, seeking to ensure the possibility of judicial review in the event the federal court abstained after the time to file the state action had expired. Pet. Br. 7-8. Sprint immediately moved to stay the state case pending resolution of the federal action. Pet. Br. 8. No decision was made on that stay motion.

In the meantime, the district court issued a decision abstaining from exercising jurisdiction over Sprint's case. Pet. App. at 11a-27a. The district court broadly ruled that "Sprint's state court action *** is properly characterized as an appeal from the [Board]'s orders," and that appellate review of state administrative action is "an uninterruptible process under the *Younger* doctrine." Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The Eighth Circuit rejected Sprint's argument

that *Younger* abstention is unwarranted when a federal challenge is brought to the actions of a state administrative agency, even where the state agency is exercising congressionally conferred power under a "pervasive federal regulatory scheme." Pet. App. 7a. The Eighth Circuit adhered to its prior precedent that had permitted *Younger* abstention in remedial proceedings, and concluded that, because the Board's order "attempts to enforce liabilities based on present facts and existing laws *** it constitutes a judicial proceeding that is entitled to *Younger* abstention." Pet. App. 9a.

SUMMARY OF ARGUMENT

Congress expressly conferred jurisdiction on federal courts to review state regulatory decisions applying the 1996 Telecommunications Act. When telecommunications companies invoke that jurisdiction, federal courts have an obligation to exercise that assigned authority. Providing companies the very access to federal courts that Congress intended plays a critical role in ensuring state regulators' compliance with the federal requirements set forth in the Telecommunications Act, and thereby promotes the effective operation of the prevailing federal-law regime now governing telecommunications.

The Eighth Circuit's expansion of *Younger* abstention and, in particular, its failure to recognize that where *Ex Parte Young* jurisdiction is proper, *Younger* abstention is not, departs from settled precedent. The ruling also upends the calibrated

balance between state and federal roles that the Telecommunications Act prescribes. Where, a "state commission *qua* federal regulator[] *** has accepted congressionally conferred power to decide matters of federal law in the first instance," federal review of the state agency's order poses no dishonor to "the dignity of the State." *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 651 (2002) (Souter, J., concurring).

Indeed, in no case, to CTIA's knowledge—and the Eighth Circuit cited none—has this Court applied the abstention doctrine to force a federal court to surrender pre-existing federal jurisdiction over a state agency's interpretation of federal law as part of a federal regulatory scheme. With good reason. As this Court recognized in upholding federal jurisdiction in *Verizon Maryland*, the comity and federalism interests underpinning "Our Federalism" are at their nadir when state agencies are applying federal law in the voluntary performance of a federal regulatory role that is circumscribed by federal statute.

Under this Court's precedent, the unique comity and federalism interests needed to justify a rare surrender of jurisdiction require a substantial and distinct state interest of such independent force as to override the powerful federal interest in having questions of federal law decided by the federal courts. To abdicate jurisdiction over a first-filed federal case presenting such substantial and controlling questions of federal law simply because a later-filed state action is pending would allow the abstention exception to swallow wholesale the jurisdictional rule. Because

there is no paramount State interest to defer to when the state agency is carrying out its subsidiary role in a *federal* regulatory scheme, abstention was improper.

Finally, the proper balance between federal and state interests under the Telecommunications Act cannot be maintained if any appeal of final state agency action by any party would oust the federal court's jurisdiction over a federal-question case designed specifically to police whether a state agency complied with federal law. As Congress intended, CTIA and its members rely on unimpeded access to federal courts to ensure that the Telecommunications Act is properly implemented by the 50 different state regulators who participate in the cooperative federalist scheme. Federal judicial review helps to secure uniformity and consistency of regulatory approach in a national program, and yields the predictability and stability in the law that permits their cost-effective participation in a national market for wireless services.

ARGUMENT

I. THE FEDERAL COURTS' EXERCISE OF THE JURISDICTION THAT CONGRESS CONFERRED ENSURES THE COHERENT OPERATION OF A COMPLEX FEDERAL REGULATORY SCHEME.

A. Federal Judicial Review Provides Critical Oversight Of State Agencies' Compliance With The Telecommunications Act.

Federal judicial review is critical to the successful operation of the federal legal regime set in place by the 1996 Telecommunications Act. Given both the subsidiary role that state regulators assume under federal law and the "fact that a federal program administered by 50 independent state agencies [would be] surpassing strange," *AT&T*, 525 U.S. at 378 n.6, this Court has expressed "no doubt, *** that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel," *id.*

This Court's precedent accordingly has unequivocally endorsed not just the availability, but also the paramount importance to Congress's statutory scheme, of federal court review of federal-law questions raised by the actions of state agencies implementing the Telecommunications Act. In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), the Court unanimously agreed that "federal courts have jurisdiction under [28 U.S.C.] § 1331 to entertain

such a suit" seeking relief from a state regulator's action on the ground that it is preempted by the Telecommunications Act, 535 U.S. at 642; *compare* JA6a (Complaint at ¶ 21).

Like this case, *Verizon Maryland* originated as a private dispute between two carriers regarding payment terms. 535 U.S. at 639. "Verizon informed WorldCom that it would no longer pay reciprocal compensation for telephone calls made by Verizon's customers to the local access numbers of Internet Service Providers" because, in its view, such calls were not "local traffic" within the meaning of the carriers' Interconnection Agreement. *Id.* (footnote omitted). WorldCom then filed a complaint with the state regulator, which twice ruled that payment was required. *Id.*

Following that adverse ruling, Verizon went to federal court, where it sought federal declaratory and injunctive relief on the ground that the state agency's mandated payments violated the Telecommunications Act and an FCC ruling. *Verizon Maryland*, 535 U.S. at 640. The Court held that federal question jurisdiction was proper because "resolution of Verizon's claim turns on whether the Act, or an FCC ruling issued thereunder, precludes the Commission from ordering payment of reciprocal compensation, and there is no suggestion that Verizon's claim is 'immaterial' or 'wholly insubstantial and frivolous.'" *Id.* at 643 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). The Court held, as well, that the Eleventh Amendment posed no bar to recovery because Verizon could "proceed against the individual

commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908)." 535 U.S. at 645-646.

Justice Kennedy joined the opinion. *Verizon Maryland*, 535 U.S. at 648-649 (Kennedy, J. concurring). He recognized that the Court's "*Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law," and then concluded that federal judicial review was appropriate because Verizon's complaint, raising a preemption challenge to state action "parallels the very suit permitted by *Ex parte Young* itself." *Id.* at 649 (Kennedy, J., concurring).

Justices Souter, Ginsburg and Breyer agreed, noting that Verizon sought "not a simple order of relief running against the state commission," "but a different adjudication of a federal question by means of appellate review in Federal District Court." *Verizon Maryland*, 535 U.S. at 650-651 (Souter, J. concurring). There were thus even stronger grounds for federal jurisdiction than there were in *Ex Parte Young*. *Id.* at 651 (footnote omitted).

As Justice Souter explained, the carrier's federal law challenge was made to a "state commission *qua* federal regulator," and reversal of the state agency's order would thus pose no dishonor to "the dignity of the State, which has accepted congressionally conferred power to decide matters of federal law in the first instance." *Verizon Maryland*, 535 U.S. at 651 (Souter, J., concurring). Indeed, state agencies that are exercising federal power and implementing federal law, when acting pursuant to their regulatory

authority under the Telecommunications Act, are acting as "deputized federal regulators," whose functions "are confined to the role the Act delineates." *Pacific Bell v. PAC-West Telecomms., Inc.*, 325 F.3d 1114, 1126 n.10 (9th Cir. 2003) (internal quotation marks and citations omitted); *see also MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). State sovereign interests are thus not implicated when the state agency acts in a *federal* regulatory capacity and is addressing questions of federal law as an administrator of a federal scheme.

B. Federal Courts Routinely Review State Regulatory Action For Compliance With The Telecommunications Act.

Since the passage of the Telecommunications Act, federal courts have regularly been called upon to review the actions of state agencies exercising congressionally conferred power in their role as deputized federal regulators. *See, e.g., Talk America v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011) (federal law challenge to Michigan Public Service Commission's order that AT&T provide entrance facilities at cost-based rates); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 709 (6th Cir. 2012) (state agency's authority to set "'fair, just and reasonable'" rates for network services was preempted); *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611 (7th Cir. 2008) (upholding injunction against state agency's directive that Illinois Bell sell certain network services on an unbundled basis as "contrary to the FCC's interpretation and application of federal

law"); *Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 684 F.3d 721 (8th Cir. 2012) (state agency order requiring an incumbent local exchange carrier to submit price list for review and approval preempted by Telecommunications Act); *Illinois Bell Tel. Co. v. Globalcom, Inc.*, No. 03 C 0127, 2003 WL 21031964 (N.D. Ill. May 6, 2003) (overturning state agency's decision because agency exceeded its jurisdiction by interpreting Illinois Bell's federal access tariff); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd* 530 F.3d 676 (8th Cir. 2008) (holding that state agency's order adopting arbitrated interconnection agreement was preempted by FCC regulations); *Southwestern Bell Tel., L.P. v. Moline*, 333 F. Supp. 2d 1073 (D. Kan. 2004) (preliminarily enjoining enforcement of state agency's rule).[4]

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[4] Providers also bring federal appeals challenging local zoning boards' denials of requests to build wireless towers, when such rulings do not satisfy the Act's federal standards. *See, e.g., T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Cir. 2012) (reversing denial of application to build wireless tower as unsupported by substantial evidence); *T-Mobile Ne. LLC v. City Council of Newport News, Va.*, 674 F.3d 380 (4th Cir. 2012) (same); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299 (10th Cir. 2008) (same); *PrimeCo Pers. Commc'ns, Ltd. v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003) (same); *Sprint PCS Assets LLC v. City of La Cañada Flintridge*, 448 F.3d 1067 (9th Cir. 2006) (same). In those cases, because federal interests are balanced against the sometimes competing local interests implicated in zoning choices, Congress has explicitly recognized the concurrent jurisdiction of state and federal courts, and given the losing party the choice of forum. *See* 47 U.S.C. § 332(c)(7)(B)(v).

CTIA, its members, and their affiliates appear regularly before state regulatory bodies, with hundreds upon hundreds of cases pending before state utility commissions every year. Most of these cases never make it to federal court, but when they do, federal judicial review matters. The availability of federal judicial review assures authoritative and uniform resolution of precisely those most complex federal questions when necessary to maintain the balance Congress struck. In so doing, it facilitates the uniform implementation of a national policy of competition, unfettered access to local markets, and federally balanced regulation.

Notably, experience shows that carriers have been circumspect in invoking the federal forum. When cases involve primarily state-law questions, and there are no competing federal interests, CTIA members or their non-wireless affiliates often seek review of essentially local matters decided by state agencies in state courts, which are "wholly separate court system[s] designed primarily to concern [themselves] with local law." *Palmore v. United States*, 411 U.S. 389, 407-408 (1973). *See also, e.g.*, *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 921 N.E.2d 1147 (Ill. App. Ct. 2009) (Illinois Bell appealed decision of the Illinois Commerce Commission determining that it had violated the Illinois Public Utilities Act); *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 810 N.E.2d 1179 (Ind. Ct. App. 2004) (Indiana Bell sought judicial review of state agency's denial of request to keep information submitted in response to local competition survey confidential); *AT&T v.*

Pennsylvania Pub. Util. Comm'n, 737 A.2d 201 (Pa. 1999) (carriers sought review of order of state agency denying reimbursement of costs for relocating fiber optic cables); *Alhambra-Grantfork Tel. Co. v. Illinois Commerce Comm'n*, 832 N.E.2d 869 (Ill. App. Ct. 2005) (appeal of agency order cancelling wireless termination tariff).

But when federal questions are presented, CTIA and its members depend critically on their ability to "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Federal judicial review facilitates the "certainty and definition that come from nationwide uniformity of decision," *Glidden Co. v. Zdanok*, 370 U.S. 530, 560 (1962), and provides a stable environment that facilitates investment and growth. Because Article III courts are "devoted to matters of national concern," *Palmore*, 411 U.S. at 408, they are best-positioned to address questions with such far-reaching national implications. Businesses cannot fulfill the promise of the Telecommunications Act and build an increasingly competitive national communications market that can rapidly deploy and adopt new technologies if they have to navigate a crazy quilt of 50 different interpretations of intrinsically federal questions. *See* H.R. Rep. No. 459, at 1, 104th Congress, 2d Sess. (Jan. 31, 1996) (Conf. Rep.) (1996 Act intends a "national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all

Americans by opening all telecommunications markets to competition"). Consumers, too, might pay the price as increased uncertainty and the costs of dealing with varying regulatory regimes across state lines could affect business decisions, slow down innovation, and, possibly, result in higher prices.

Under the cooperative federalist regime embodied in the Telecommunications Act, state agencies that assume the role of "deputized federal regulators" resolve localized issues subject to federal direction and oversight while applying federal-law standards. "With regard to the matters addressed by the 1996 Act," the Federal Government "unquestionably" "has taken the regulation of local telecommunications competition away from the States." *AT&T*, 525 U.S. at 378 n.6. The availability of federal judicial oversight ensures a consistency in federal regulatory focus and uniformity in federal legal standards that is indispensable to the consistent and stable functioning of the Telecommunications Act, especially because it is implemented through a hybrid jurisdictional scheme. *See id.*

In short, this Court's decision in *Verizon Maryland*, *supra*, demonstrates the indispensable role such federal judicial review plays in the effective functioning of the federal telecommunications regime. Nothing in this Court's precedent supports an abdication of this congressionally conferred responsibility to provide federal judicial oversight of federal regulatory issues.

II. ABSTENTION IS A NARROW EXCEPTION TO THE FEDERAL COURTS' VIRTUALLY UNFLAGGING OBLIGATION TO EXERCISE THE JURISDICTION THAT CONGRESS ASSIGNS.

A. Abstention Is Meant To Be A Rare Exception.

"[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). For that reason, "[t]he doctrine of abstention *** is an extraordinary and narrow exception" to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976) (internal quotations omitted).

Accordingly, this Court's "cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. ("NOPSI") v. Council of New Orleans*, 491 U.S. 350, 358 (1989). As explained in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), while "this Court will not take jurisdiction if it should not," it is "equally true, that it must take jurisdiction if it should," *id.* at 404. "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it," Justice Marshall's opinion emphasized, because "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.*

For that reason, a federal court's "[a]bdication" of the duty to exercise jurisdiction on abstention grounds is justified only in "exceptional circumstances." *Colorado River*, 424 U.S. at 813.

B. Abstention Is Only Appropriate To Avoid Undue Interference With Paramount State Interests That Lie At The Core Of A Case.

Abstention is proper only in those rare circumstances where state law is so critical to the case's disposition and the state interest is so "paramount" that "principles of comity and federalism" override the traditional duty to exercise conferred jurisdiction. *Quackenbush*, 517 U.S. at 723 (emphasis added). Reflexive deference to any passing assertion of some state interest is inappropriate. "'Our Federalism,' *** does not mean *** deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Rather, the concept is premised on "sensitivity to the legitimate interests of *both* State and National Governments," *id.* (emphasis added), and it thus must be applied in a way that ensures the vindication and protection of federal rights and federal law.

Federalism, in other words, is a balance. The court of appeals here cut the federal half out of that balance, while overinflating the state interest in this pervasively federal scheme. After all, the district court below indisputably had federal question jurisdiction over Sprint's federal preemption claim, *Verizon Maryland*, 535 U.S. at 643; Pet. App. 4a. In

the telecommunications sphere, moreover, Congress has already struck the proper balance between state and federal interests, and it gave federal interests preeminent status. "Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control." *AT&T*, 525 U.S. at 381 n.8. And States willingly subscribe to that balance when they choose to don a federal role and to help administer this federal program under federal standards.

This Court has identified three circumstances in which a federal court's abstention from exercising its congressionally assigned jurisdiction may be warranted. This case fits none of them.

1. **Pullman *Abstention Does Not Apply.***

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), this Court held "that federal courts should abstain when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). *Pullman* abstention promotes fundamental principles of constitutional avoidance by preventing "the waste of a tentative decision" of constitutional law, which might be avoided by clarification of state law. *Pullman*, 312 U.S. at 500. The doctrine also protects against erroneous interpretations of state law, *id.* at 500-501, and promotes comity by recognizing the "'rightful independence of the state governments.'" *Id.* at 501 (citation omitted).

None of those justifications has any application here. There is no federal constitutional question to

be avoided. The central legal questions involve federal law; there is no question of state law at all, let alone one in need of clarification. Finally, all the comity considerations point in favor of federal jurisdiction because the state regulatory agency is acting as a "deputized federal regulator" in a cooperative federal scheme governed exclusively by federal law. *Pacific Bell*, 325 F.3d at 1126 & n.10.

2.* Burford *Abstention Is Unwarranted.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court held that, "[w]here timely and adequate state-court review is available" federal courts should not exercise their equitable authority in a way that would "interfere with the proceedings or orders of state administrative agencies[]" when "there are difficult questions of *state law* bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or when federal review "would be disruptive of *state efforts to establish a coherent policy* with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361 (internal quotation marks and citation omitted) (emphases added).

That doctrine does not fit here either. The very structure of the Telecommunications Act leaves no state law questions at stake that need to be protected from "undue federal interference." *NOPSI*, 491 U.S. at 362. Petitioner, indeed, seeks federal adjudication of a federal preemption claim that involves *no* state law issues. Only the congressionally designed, national regulatory framework is at stake. As this Court explained in *Verizon Maryland*, it is federal policy, not state policy, that is transcendent in cases

like this, and the exercise of federal-court review would vindicate that interest. "[T]he principles underlying *Burford* are therefore not implicated." *NOPSI*, 491 U.S. at 362, 364.

3.* Younger *Abstention Is Inappropriate.

The court of appeals relied primarily on the abstention doctrine applied by this Court in *Younger v. Harris*, 401 U.S. at 43-44. Under *Younger*, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Auth.*, 467 U.S. at 237-238 (citing *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432–437 (1982)).

That doctrine has no more relevance here than the other abstention principles. To begin with, as Sprint suggests, *Younger* is the wrong abstention doctrine to apply when challenging state administrative action. Pet. Br. 32-35. Instead, the *Burford* framework should be used to analyze the "potential for conflict with state regulatory law or policy." *NOPSI*, 491 U.S. at 362 (internal quotation marks and citation omitted). And *Burford* abstention by its terms does not apply here.

On top of that, *Younger* addressed the propriety of abstention when the equitable relief sought in federal court would restrain state *criminal* proceedings, 401 U.S. at 43-44, and was grounded "in view of the fundamental policy against federal interference with state criminal prosecutions," *id.* at 46. At its core, *Younger* abstention interdicts "federal judicial interference with a state's effort to bring the

violators of its laws to book." *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990) (vacated as moot in *Dillon v. Alleghany Corp.*, 499 U.S. 933 (1991)). To be sure, this Court has extended *Younger* to isolated categories of civil proceedings. But those exceptions prove the rule, because each of those civil contexts directly implicated the States' law-enforcement interests. *See Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 41 (1st Cir. 2012).

First, *Younger* abstention has been applied to "enforcement actions to which the state is a party." *Massachusetts Delivery*, 671 F.3d at 41; *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (*Younger* prevented federal court from enjoining state action enforcing nuisance statute barring exhibition of obscene films); *Moore v. Sims*, 442 U.S. 415, 423 (1979) (*Younger* prevented federal court from enjoining state action seeking temporary custody of children); *Middlesex County Ethics Comm.*, 457 U.S. at 431-432 (*Younger* prevented federal court from enjoining state proceeding to discipline attorney); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (*Younger* applied to action "brought by the State in its sovereign capacity" to recover state welfare payments); *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986) (*Younger* applied to enforcement action brought by state agency against employer to vindicate state policy against gender discrimination).

Second, *Younger* abstention has been extended to "civil actions involving 'administration of a State's judicial system,' *** such as a court's contempt proceedings, *** and the ability to enforce a valid

state-court judgment." *Massachusetts Delivery Ass'n*, 671 F.3d at 41 (quoting *Juidice v. Vail*, 430 U.S. 327, 335 (1977)); *see also Juidice*, 430 U.S. at 336 (*Younger* applied to prevent federal court interference with contempt proceeding in civil case); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987) (*Younger* prevented federal court from enjoining state court enforcement of state appeals bond and lien provisions).

This case, of course, does not in any way involve or implicate state criminal proceedings. Nor is any state enforcement action at issue. Sprint is the plaintiff, not a government regulator. Beyond that, nothing in the case touches upon a State's fundamental interest in organizing its own internal judicial processes or political affairs. Quite the opposite, the regulatory scheme at stake is entirely federal. The only question is whether the Iowa Utilities Board's decision is preempted by federal law, a question that a federal court is best-positioned to resolve, and the resolution of which cannot "unduly interfere with the legitimate activities of the States," *Younger*, 401 U.S. at 44, because the State is acting as a regulator of *federal* law.

Indeed, not one of this Court's cases finding abstention to be warranted has ousted a federal court from reviewing the final action of a state agency exercising congressionally conferred power and acting "*qua* federal regulator." *Verizon Maryland*, 535 U.S. at 651 (Souter, J., concurring). There simply is no cognizable state interest on which to hinge abstention, let alone a paramount one capable of derailing Congress's calibrated and cooperative

federal scheme. The court of appeals' abandonment of its "strict duty" to exercise federal jurisdiction, *Quackenbush*, 517 U.S. at 716, was therefore unjustified.

4. NOPSI *Does Not Support The Ruling Below.*

The Eighth Circuit's reliance on this Court's decision in *NOPSI* is particularly inapposite. There, this Court held that *Burford* and *Younger* abstention should *not* be applied when, as here, the sole issue before the court was one of facial federal preemption of an agency's rate order. 491 U.S. at 362. The State's interest in local rate-setting was insufficient to create the exceptional circumstances that would allow a federal court to relinquish its strict duty of adjudicating a pure issue of federal law. *See id.*

As in *NOPSI*, this case does "not involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state-law that must be untangled before the federal case can proceed." 491 U.S. at 361 (internal quotation marks omitted). In *NOPSI*, the issue was whether "the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs." *Id.* Here, Sprint's primary claim is that the Iowa Utilities Board violated federal law by ordering it to pay access charges. The essential elements of Sprint's primary claim thus mirror the argument in *NOPSI* that the state regulator was prohibited by federal law from issuing the challenged payment ruling. *See id.* at 362.

Accordingly, as in *NOPSI*, there is no basis to surrender federal jurisdiction here because "federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem[.]" *NOPSI*, 491 U.S. at 362 (internal quotation marks and citation omitted).

To be sure, *NOPSI* acknowledged the State's "substantial, legitimate interest in regulating intrastate retail rates." 491 U.S. at 365. But that just makes this case an even stronger candidate for retention of federal jurisdiction because no such local interest is presented here. Instead, the only question is whether, as a matter of federal law, Sprint's VoIP service was subject to state regulation at all.

Ultimately, because the Court determined that the rate-making proceeding at issue in *NOPSI* was legislative and not judicial, the Court had no need to determine whether *Younger* could appropriately be extended to a broader range of judicial proceedings, where neither a State's enforcement interests nor internal governmental affairs are at issue. *Id.* at 372. But, importantly, *NOPSI* emphasized the strict limits on the "type of proceeding[s] to which *Younger* [abstention] applies." 491 U.S. at 367. This Court stressed that *Younger* had previously been extended beyond state criminal prosecutions only to civil enforcement actions and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 368. Nothing in the Court's decision supported extending *Younger* to the type of

routine agency action, centrally dependent on federal law, that was at issue in *NOPSI* and is at issue here.

In short, *NOPSI* makes clear that characterizing a proceeding as "judicial in nature," is a necessary but not sufficient condition for *Younger* abstention. The Eighth Circuit's critical error was in failing to recognize that *Younger* abstention requires more: a likelihood that the exercise of federal jurisdiction will intrude upon distinct and paramount State *sovereign* interests, either by interfering with enforcement interests aimed at stopping violations of important state laws or by challenging the State's internal governance choices. Under *Verizon Maryland*, no abstention-warranting threat to a State's interests is posed by the assertion of federal jurisdiction over federal-law issues raised in a state regulatory action, when the state agency was exercising congressionally conferred authority under the Telecommunications Act.

C. Sprint's Protective State Action Provides No Basis For Abstention.

Sprint's filing of a protective state action has nothing to do with the federal court's independent obligation to adjudicate Sprint's first-filed federal suit.

First, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan v. Carland*, 217 U.S. 268, 282 (1910). In fact, in *NOPSI*, this Court rejected both *Burford* and *Younger* abstention despite the filing of a protective state appeal. 491 U.S. at 364, 373. There, like

Sprint, the party challenging the agency action in federal court "[a]nticipat[ed] that the District Court might *** abstain," and filed a protective appeal in state court, in which the federal pre-emption claim was also presented. *NOPSI*, 491 U.S. at 357-358. The mere filing of this protective state case played no role in this Court's abstention analysis. Quite the opposite, this Court expressly considered and then declined to endorse the view that the state appeal should be viewed as an integrated part of an ongoing proceeding because—just like here—the challenged agency action was already final. *Id.* at 369 & n.4.

Second, and relatedly, the Eighth Circuit's reasoning contravenes this Court's repeated recognition that the mere pendency of a parallel state action does not, without more, warrant abstention. As this Court has explained, "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport, New York v. Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977). Abstention has "never" meant that "a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n. v. Southern Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result). Rather, "[f]ederal courts abstain out of deference to the paramount interests of another sovereign." *Quackenbush*, 517 U.S. at 723. The parallel presentation of a federal claim for review in a later-filed, protective state case, without more, does not create such a rare and paramount

state interest, let alone trigger the powerful structural comity and federalism concerns required to justify abstention.

Third, even if this Court were to conclude that the existence of a later-filed, protective state action by the same party who filed the federal suit carried some weight in the abstention balance, the Eighth Circuit's decision swept far too broadly, finding abstention warranted regardless of who initiated the state court action. The Eighth Circuit's decision is therefore doubly flawed because it encourages the filing of state appeals by an opposing party for the mere purpose of ousting properly sought and rightfully exercised federal jurisdiction. The court of appeals' decision thus creates incentives for procedural gamesmanship, encouraging parties with any potential grounds for state appeal, no matter how trivial, to file parallel state actions as a means of thwarting the federal judicial review that Congress intended.

Even worse, because Sprint's state case was filed after its federal court declaratory judgment action, a broad affirmance would allow opposing parties to go to state court *after* federal relief has attached and usurp the undisputed federal jurisdiction to review federal law challenges to the authority of state action. Such splintering of jurisdiction would open the door to 50 different interpretations of important federal questions, and be "surpassing strange," given the state agencies' subsidiary role in executing a federal regulatory regime. *AT&T*, 525 U.S. at 378, n.6. The Eighth Circuit's broad ruling thus is irreconcilable with the

guiding premise that abstention is proper only in "exceptional circumstances." *Colorado River*, 424 U.S. at 813.

III. AFFIRMANCE WOULD ALLOW THE ABSTENTION EXCEPTION TO SWALLOW THE FEDERAL JURISDICTIONAL RULE.

A. Comity And Federalism Interests Are At Their Nadir When State Agencies Have Chosen to Act As Deputized Federal Regulators.

Because the sole issue in this case is the propriety of the Iowa Utility Board's ruling on a federal statutory question, dramatically expanding the abstention doctrine to justify the district court's failure to adjudicate this case "would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368. That is because, "[w]hether an issue comes from a state-agency or a state-court decision, the federal court is reviewing the State's determination of a question of federal law," and in that circumstance, "it is neither prudent nor natural to see such review as impugning the dignity of the State or implicating the States' sovereign immunity in the federal system." *Verizon Maryland*, 535 U.S. at 653 (Souter, J., concurring).

Here, the Iowa Board was acting in the voluntarily assumed capacity of a federal regulator and, in that role, was asked to resolve a "run-of-the-

mill contract dispute," *Quackenbush*, 517 U.S. at 729, concerning the parties' rights under the tariff. When the Board reached out beyond the dispute presented by the parties to decide a substantive question of federal law under the Telecommunications Act, no "fundamental concerns of federalism" or state interests, *id.* at 734 (Kennedy, J., concurring), were implicated. Far from involving an "'essentially local'" problem, *NOPSI*, 491 U.S. at 362 (citation omitted), the issue presented for federal review was quintessentially federal and far-reaching. Indeed, in assessing the parties' obligations under the tariff, the Iowa Utilities Board was acting within the confines of congressionally conferred power under a *federal* regulatory regime, where exclusive state control had been supplanted by the Telecommunications Act.

Tellingly, where it was warranted and consistent with the federal scheme, Congress identified certain categories of local governance concerns that the Telecommunications Act itself would protect and preserve. In *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Court held that 47 U.S.C. § 253, which authorizes the preemption of state and local laws prohibiting "any entity" from providing a "telecommunications service," was no bar to state statutes that prevented political subdivisions from providing telecommunications services. In applying the clear statement rule announced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court "invoke[d] [its] working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great

skepticism, and read in a way that preserves a State's chosen disposition of its own power," *Nixon*, 541 U.S. at 140.

Congress too, has protected State interests in the structure of the Act by allowing States to opt out of exercising certain federal functions if they so desire, *see* 47 U.S.C. § 252(e)(5), and authorizing state court review of local zoning board rulings, if requested by an aggrieved party, *see id.* § 332(c)(7)(B)(v).

But when a state agency is simply interpreting federal law in the course of fulfilling a subordinate role in a federally infused scheme, and the only issue is whether the state agency exceeded its authority under federal law, there is no paramount state interest to which to defer. *Verizon Maryland*, 535 U.S. at 649 (Kennedy, J., concurring). Rather, the task of the federal courts is to ensure that state regulatory action, even over purely intra-state traffic, complies with the mandates of the Telecommunications Act.

B. Affirmance Would Eviscerate The Congressionally Conferred Right To Federal Judicial Review.

Ultimately, condoning abstention would undermine the opportunity for federal review recognized in *Verizon Maryland*. It would also be entirely inconsistent with the underlying purposes of abstention doctrines, which are meant to serve the foundational interests of "Our Federalism," and not allow parties to destroy federal jurisdiction by procedural choices. The "virtually unflagging

obligation" to exercise federal jurisdiction, *Colorado River*, 424 U.S. at 817, should not be subject to such ready manipulation by private parties' litigation strategies. There would be "something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse." *Hicks v. Miranda*, 422 U.S. 332, 354 (1975) (Stewart, J., dissenting).

This Court has already recognized, in affirming the availability of *Ex Parte Young* relief in *Verizon Maryland*, that any sovereign interests that might warrant abstention are absent when state agencies are applying and deciding questions of federal law as part of their congressionally conferred role under the Telecommunications Act. *Verizon Maryland*, 535 U.S. at 646-647. Because abstention is unwarranted where no paramount state interests are threatened, it is singularly improper where, as here, federal jurisdiction lies under *Ex Parte Young* precisely because the case rises and falls on questions of federal law. *See Younger*, 401 U.S. at 45 (recognizing that abstention is inappropriate even in the criminal context when the requirements for an *Ex Parte Young* action are satisfied).

CTIA and its members depend upon the availability of federal judicial review to ensure that their business operations can be undertaken within a uniform, stable, and authoritative federal regulatory regime. They have a "serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (internal quotation marks and citations omitted). The risks of disuniformity and uncertainty

in the law that could arise in the face of 50 different state rulings on the same federal regulatory question could disrupt their ability to provide services and could chill investment in the deployment and adoption of new technologies. The Eighth Circuit's vision of abstention simply cannot coexist with a national regulatory framework that promotes competition by ending state control of local monopolies and by establishing a framework of federal rules meant to bind State regulators and to apply uniformly across State boundaries.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-815

Supreme Court, U.S.
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In The

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, INC.,

Petitioner,

v.

ELIZABETH S. JACOBS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE IOWA OFFICE OF CONSUMER ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly found abstention was appropriate since state proceedings were conducted under state law to defend important state interests.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE IUB ACTED UNDER STATE LAW AND REGULATIONS 2

II. THE PROCEEDING BEFORE THE IUB INVOLVES IMPORTANT STATE INTERESTS 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASE LAW AND ADMINISTRATIVE DECISIONS

Connect America Fund, etc., WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663, ¶ 934 (FCC Nov. 18, 2011).....6

Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).....8, 9

New Orleans Pub. Serv., Inc. v. City of New Orleans, 491 U.S. 350 (1989).....6

Numbering Policies for Modern Communications, IP-Enabled Services, et al., Docket No. 13-97, *et al.*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, FCC 13-51, 28 FCC Rcd. 5842, ¶ 6 (FCC Apr. 18, 2013).....6

Petition of UTEX Communications Corp., etc., DA 09-2205, 24 FCC Rcd. 12573, ¶¶ 9-10 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 FCC Rcd. 14168 (Wir. Comp. Bur. 2010).....6

Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002).....4

STATUTES AND REGULATIONS

47 U.S.C. § 152(b).....4, 5

47 U.S.C. § 252.....4

47 U.S.C. § 252(e)(5).....6

199 Iowa Admin. Code r. 22-14 (2013).....4

TABLE OF AUTHORITIES – Continued

Page

Iowa Code § 17A.18A(1) (2013) 2
Iowa Code § 475A.2(2) (2013) 1
Iowa Code § 475A.2(4) (2013) 1
Iowa Code § 476.1D (2013) 8
Iowa Code § 476.3 (2013) 7
Iowa Code § 476.3(1) (2013) 3
Iowa Code § 476.4 (2013) 3
Iowa Code § 476.5 (2013) 7
Iowa Code § 476.11 (2013) 4
Iowa Code § 476.20(1) (2013) 7
Iowa Code § 476.29 (2013) 7
Iowa Code § 476.95(1) (2013) 7
Iowa Code § 476.95(2) (2013) 7
Iowa Code § 476.100-101 (2013) 3
Iowa Code § 476.101(9) (2013) 9

INTEREST OF *AMICUS CURIAE*[1]

The Office of Consumer Advocate (OCA) is a statutory division of the Iowa Attorney General's office, charged with the duty to act as attorney for and represent all consumers generally and the public generally in proceedings before the Iowa Utilities Board (IUB), and in actions instituted in state or federal court which involve the validity of a rule, regulation, or order of the IUB. Iowa Code §§ 475A.2(2), (4) (2013). OCA participated in the formal complaint proceeding before the IUB and the state judicial review proceeding filed by Sprint Communications Company, L.P. (Sprint). OCA submits this brief as *amicus curiae* in support of Respondent IUB to highlight the nature of the state proceeding and the IUB's authority to enforce state laws and regulations which involve important state interests, including protecting Iowa consumers from the harms associated with the loss of telecommunications services.

SUMMARY OF ARGUMENT

The IUB acted under state law and regulations when it adjudicated the complaint involving a dispute between two carriers who each claimed to be

[1] The parties' consent to the filing of *amicus curiae* briefs in this case has been filed with the Clerk. None of the parties or their counsel authored this brief in whole or in part, and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

operating under the provisions of an intrastate access tariff approved by the IUB. The IUB's action was necessary for the vindication of important state policies involving the regulation of utilities, including preservation of the integrity of the telephone network, protection of the health, safety and welfare of telephone customers, and the furtherance of competition in the telecommunications market in Iowa.

ARGUMENT

I. THE IUB ACTED UNDER STATE LAW AND REGULATIONS.

The complaint Sprint brought before the IUB sought relief from imminent disconnection of carrier switched access services provided by Windstream Iowa Communications, Inc. (Windstream).[2] Sprint's complaint was based solely on state statutory provisions. State law authorized the IUB to conduct emergency adjudicative proceedings in situations involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.[3] In addition, the IUB has broad authority to review a utility's rates, charges, schedules, service or regulations and

[2] Iowa Telecommunications, Inc. d/b/a Iowa Telecom, the respondent in the dispute before the IUB, merged with Windstream Corporation and was renamed Windstream Iowa Communications, Inc.

[3] Iowa Code § 17A.18A(1) (2013).

determine whether they are unjust, unreasonable, discriminatory or violate any other provision of law.[4] The IUB also must act to promote competition and enforce restrictions against certain acts which might impede competition.[5]

Sprint had unilaterally stopped paying intrastate access charges for intrastate long distance calls using Voice over Internet Protocol (VoIP), as required by Windstream's intrastate access tariff approved by the IUB.[6] Sprint claimed that it had properly disputed the charges and withheld payment, as permitted by the tariff. In response, Windstream threatened to disconnect the carrier services provided to Sprint for non-payment, also permitted by the tariff. (Pet. App. 64a-65a). Both parties claimed their contradictory actions were permitted under Windstream's tariff. While the immediate threat of disconnection and need for emergency agency action was removed through the informal actions of the parties, both Sprint and Windstream acknowledged the dispute would likely recur. (Pet. App. 65a-67a). In that context, the IUB moved forward to resolve the underlying dispute between the parties about their rights and obligations under the intrastate access tariff and the application of tariffed charges to the intrastate traffic in question. (Pet. App. 67a-68a).

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[4] Iowa Code § 476.3(1) (2013).

[5] Iowa Code §§ 476.100-101 (2013).

[6] The IUB has authority to investigate and approve intrastate access tariffs under Iowa Code § 476.4 (2013).

The dispute before the IUB was based on state law and involved intrastate calls. The Telecommunications Act of 1996 reserves state authority over intrastate communication services. 47 U.S.C. § 152(b). There are some specific provisions of the Telecommunications Act of 1996 that delegate authority to state regulators. For example, 47 U.S.C. § 252 delegates some authority over negotiated interconnection agreements and arbitrations to state regulators, and both Sprint (Br. 14-16) and CTIA—The Wireless Association (CTIA) (Br. 13-16) rely on *Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635 (2002), which involved the interpretation and enforcement of an interconnection agreement. The case before the IUB, however, did not involve an interconnection agreement or arbitration. It required the IUB to interpret an intrastate access tariff it had previously approved, and adjudicate the contradictory actions of disputing carriers who each claimed to be acting pursuant to the terms of that tariff. The IUB's jurisdiction over intrastate access charges is complaint based, and arises when carriers cannot agree to the terms and conditions upon which intrastate toll traffic is exchanged.[7] The authority to consider complaints necessarily includes switched access services which carriers pay to originate and terminate most interexchange calls. (Pet. App. 70a). When it adjudicated the dispute between Sprint and Windstream,

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[7] Iowa Code § 476.11 (2013); 199 Iowa Admin. Code r. 22-14 (2013).

the IUB was not acting as a "deputized federal regulator" as claimed by Sprint (Br. 10) or "in the voluntarily assumed capacity of a federal regulator" as claimed by CTIA. (Br. 33). The IUB was acting under state law.

Sprint claims that under the 1996 Act, authority to regulate no longer turns on a geographic distinction between intrastate and interstate, but instead on a technological distinction between telecommunications service and information service. (Br. 4).[5] Before the IUB, Sprint claimed it was not obligated to pay intrastate access charges under the intrastate access tariff because it did not provide regulated telecommunications service but rather information service. Sprint acknowledged the status of compensation for VoIP traffic was not clear, but asserted that the issue must be resolved by the Federal Communications Commission (FCC) and argued the IUB was preempted from deciding the case. (Pet. App. 73a).

Sprint claims that it did not ask the IUB to resolve the underlying question whether VoIP traffic was subject to intrastate access charges. (Br. 6-7). In order to adjudicate the competing claims under the tariff and prevent the emergency situation from arising again, however, the IUB had to resolve the underlying dispute about VoIP traffic. When Sprint filed its complaint, the FCC had not made any final determination about the classification of the type of

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[5] Sprint concedes that the determination of where a service falls on that technological divide is often difficult. (Br. 5).

VoIP traffic provided by Sprint and whether state authority over VoIP traffic was pre-empted. In fact, the FCC has yet to finally classify VoIP traffic, and has not been persuaded that all VoIP traffic must be exclusively under federal regulation.[9] Acknowledging the resulting regulatory uncertainty created, the FCC nevertheless indicated that state regulatory agencies have had to resolve disputes over intercarrier compensation for intrastate VoIP traffic.[10] That is what the IUB did in this case.

II. THE PROCEEDING BEFORE THE IUB INVOLVES IMPORTANT STATE INTERESTS.

The regulation of utilities is one of the most important functions traditionally associated with the states' police powers. *New Orleans Pub. Serv., Inc. v.*

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[9] *Connect America Fund, etc.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663, ¶ 934 (FCC Nov. 18, 2011). As recently as April 2013, the FCC reiterated that it has not addressed the classification of interconnected VoIP services. *Numbering Policies for Modern Communications, IP-Enabled Services, et al.*, WC Docket No. 13-97, *et al.*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, FCC 13-51, 28 FCC Rcd. 5842, ¶ 6 (FCC Apr. 18, 2013).

[10] *Connect America Fund*, FCC 11-161, 26 FCC Rcd. 17663, ¶¶ 937-938. For an example contemporaneous with the IUB's adjudication, *see Petition of UTEX Communications Corp., etc.*, DA 09-2205, 24 FCC Rcd. 12573, ¶¶ 9-10 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 FCC Rcd. 14168 (Wir. Comp. Bur. 2010). The proceeding before the Texas PUC involved an arbitration under 47 U.S.C. § 252(e)(5).

City of New Orleans, 491 U.S. 350, 365-66 (1989). The Iowa legislature has adopted policy statements intended to guide the IUB in its consideration of telecommunications issues during the on-going transition from a fully-regulated market to a competitive one. These legislative findings recognize the importance of communications services in today's society and require the IUB to ensure that communications services are widely available at just, reasonable, and affordable rates from a variety of providers.[11] The IUB must also consider the effects of its decisions on competition in telecommunications markets and act to further the development of competition.[12] These important state interests were at stake in the state proceedings.

Contrary to Sprint's argument, the dispute in this case was much more than a "garden variety commercial dispute." (Br. 9). Maintaining the integrity of the state's telephone network and protecting customers from disruptions and loss of service is a vital component of the IUB's statutory duties.[13] Iowa's many rural customers often depend on long distance calls to seek medical assistance, contact family, interact with school and community officials, and conduct business. Customers' health, safety and welfare can be endangered when they lose their ability to place or receive long distance calls.

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[11] Iowa Code § 476.95(1) (2013).

[12] Iowa Code § 476.95(2) (2013).

[13] Iowa Code §§ 476.3, 476.5, 476.20(1), and 476.29 (2013).

End-user customers are the ones most affected by a carrier dispute which carries a potential for disconnection of service. Those customers expect a fully-functioning and seamless communications network, and are almost always unaware of the number and identities of the carriers who may be involved in the transmission of a toll call. The self-help remedies used as leverage by Sprint, in withholding payment, and Windstream, in threatening to disconnect services to Sprint, endangered the continuation of services to end-user customers. The actions of the disputing carriers put at risk the service to the direct and indirect end-user customers of both Sprint and Windstream, and the IUB's adjudication of the dispute was "necessary for the vindication of important state policies." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

The IUB also has a duty to consider the effects of its decisions on competition, and act to further competition where reasonable and lawful. Retail telephone rates are deregulated in Iowa and carriers set rates as they see fit.[14] Access charges are wholesale carrier rates, but are ultimately recovered from retail customers. In the case before the IUB, allowing VoIP carriers like Sprint to avoid intrastate switched access charges would reduce Sprint's cost of business and give Sprint an advantage over its interexchange carrier competitors. (Pet. App. 87a). Iowa customers

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[14] Iowa Code § 476.1D (2013).

must rely on the competitive market for services that are available from a variety of providers at reasonable and affordable rates. Different treatment of carriers would detrimentally affect that market. Iowa law also proscribes a carrier from taking any action that disadvantages a customer who has chosen to receive service from another carrier.[15] Threats to block calls or disconnect service would disadvantage customers who chose Sprint as their carrier. (Pet. App. 143a). These issues were implicated by the dispute between Sprint and Windstream, and the IUB is the entity charged with assuring the state's important state policies remain in place and are enforced. *Middlesex Cnty.*, 457 U.S. at 432.

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[15] Iowa Code § 476.101(9) (2013).

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-815

IN THE
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. ABSTENTION IS JUSTIFIED ONLY IN EXCEPTIONAL CIRCUMSTANCES 6

II. THE COURT OF APPEALS ERRED IN INVOKING *YOUNGER* ABSTENTION. 10

A. The State's Interest In Judicial Review of Agency Decisions Does Not Warrant *Younger* Abstention. 10

B. The Underlying IUB Proceeding Cannot Justify Abstention Because It Has Been Completed. 14

1. The State Had No Continuing Interest in the Regulation of Intrastate Utility Rates. 15

2. Litigation From an Agency to a Court Should Not Be Treated as a Unitary Process When the Important State Interest Justifying Abstention at the Agency Stage Does Not Persist at the Appellate Stage. 17

C. The IUB Proceedings Were Not Themselves the Kind of Judicial Proceedings To Which *Younger* Abstention Applies. 22

III. *BURFORD* IS THE ABSTENTION DOCTRINE RELEVANT TO THIS CASE, BUT ABSTENTION WOULD BE INAPPROPRIATE UNDER THAT FRAMEWORK AS WELL. 27

A. *Burford* Abstention. 29

B. Abstention Would Not Be Warranted Under *Burford*. 31

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990) 5, 18

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 31

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 2, 8, 29, 30

City of Arlington v. FCC, 133 S. Ct. 1863 (2013) 21

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 6

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 7, 10

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 8

East Buchanan Telephone Cooperative v. Iowa Utilities Board, 738 N.W.2d 636 (Iowa 2007) 16, 21

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) 7

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 21

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 9, 17, 18, 23, 24

Juidice v. Vail, 430 U.S. 327 (1977) 24, 25

Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144 (1991).....13

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).....9, 10, 11, 22, 23

Moore v. City of Asheville, 396 F.3d 385 (4th Cir. 2005).....18

Moore v. Sims, 442 U.S. 415 (1979).....24, 25

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989).....*passim*

Norfolk & Western Railway Co. v. Public Utilities Commission of Ohio, 926 F.2d 567 (6th Cir. 1991).....18

O'Neill v. City of Philadelphia, 32 F.3d 785 (3d Cir. 1994).....18

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).....9, 11, 13, 23

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).....4, 9, 25

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).....12-13, 15

Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943).....25, 26

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 8

Thomas v. Texas State Board of Medicine Examiners, 807 F.2d 453 (5th Cir. 1987) 18

Trainor v. Hernandez, 431 U.S. 434 (1977) 24

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 5, 6, 20, 21

Willcox v. Consolidated Gas Co. New York, 212 U.S. 19 (1909) 7

Younger v. Harris, 401 U.S. 37 (1971) 1, 5, 9, 23

STATUTES

28 U.S.C. § 1332 7

Md. Code, Pub. Utils. § 3-204 6

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 31

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors who teach and write on issues concerning federal courts. *Amici* have a professional interest in ensuring that the various judicial abstention doctrines are applied in a coherent and fair manner, consistent with the principles and interests underlying those doctrines.

Amici include: **Erwin Chemerinsky**, Dean and Distinguished Professor of Law, University of California, Irvine School of Law; **Kermit Roosevelt**, Professor of Law, University of Pennsylvania Law School; **Paul E. Salamanca**, Wyatt, Tarrant & Combs Professor of Law, University of Kentucky College of Law; and **Christina B. Whitman**, Francis A. Allen Collegiate Professor of Law, University of Michigan Law School.

SUMMARY OF ARGUMENT

The Court of Appeals held that *Younger* abstention, *see Younger v. Harris*, 401 U.S. 37 (1971), precludes federal courts from resolving a federal preemption challenge to final and non-coercive action by a state administrative agency.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

That marks an extraordinary and unjustified departure from this Court's precedents.

This Court has developed an abstention doctrine to evaluate a state's interest in its regulatory regime: *Burford* abstention. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Abstention is appropriate under *Burford* when a challenge to a state agency determination involves a federal interest of minimal importance, and when addressing that issue would risk upending a complex and carefully calibrated state regulatory scheme. Those indicia are not present in this case, so abstention under *Burford* would be inappropriate.

Rather than analyzing this case through the prism of *Burford* abstention, however, the Court of Appeals instead held that *Younger* abstention was required. It reasoned that *Younger* abstention was appropriate because the State has "an important interest" in the "regulation of intrastate utility rates," Pet. App. 8a, which is within the state's police power, and because a federal-court adjudication of Sprint's preemption challenge would interfere with that interest. *Id.*

In reaching this conclusion, the Court of Appeals made three fundamental errors. First, it found abstention to be warranted based upon a State interest – the regulation of intrastate utility rates – that was no longer implicated by any ongoing proceeding. The only ongoing proceeding at the time Sprint brought its federal preemption challenge was state-court judicial

review of final administrative agency action. Yet in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (*"NOPSI"*), this Court made clear that, although a State may well have an important interest in regulating utility rates, its interest in a judicial proceeding *reviewing* such regulation is not sufficiently important to warrant abstention. Indeed, the Court held that "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *Id.* at 368.

Second, the Court of Appeals overlooked *NOPSI*'s clear holding because it treated the underlying IUB proceeding as the relevant "ongoing state judicial proceeding." Pet. App. 5a, 9a ("The IUB's order . . . constitutes a judicial proceeding that is entitled to *Younger* abstention."). That is, the Court of Appeals viewed the state court's review of the IUB's final agency action as merely another step in the IUB proceeding. That too was error.

This Court has never held that state-court review of agency action should be treated simply as a continuation of an agency proceeding – particularly when the important state interest that might warrant abstention is not implicated by the review process. Here, the interest identified by the Court of Appeals as justifying abstention – an interest in regulating utility rates – is not an interest implicated during the review process. Rather, the State's formulation

of its policy through an agency proceeding, and the court's review of the legality of that policy, present different state interests and should be analyzed separately for purposes of federal abstention. That is so regardless of whether the agency has chosen to make policy through rulemaking, adjudication, or some other method.

Finally, even if the Court of Appeals were correct to view the IUB proceeding as ongoing, the Court of Appeals further erred in determining that the IUB proceeding itself was the type of proceeding to which *Younger* abstention could ever apply. According to the Court of Appeals, *Younger* applied to the IUB proceeding because it was an adjudication that involved an important state interest in ratemaking. But this Court has never applied *Younger* outside the context of criminal proceedings or coercive civil enforcement proceedings, or, at its outer edge, proceedings that challenge "the processes by which the State compels compliance with the judgments of its courts." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987). It should not extend *Younger* to apply to proceedings of the type here, involving a contractual dispute between two private parties.

The flaws in the Court of Appeals' approach are evident from what it would portend. If the Court of Appeals' analysis were accepted, federal courts would regularly be forced to abstain from hearing federal constitutional or preemption challenges to state agency actions – at least when they involve an adjudication. The agency

proceedings themselves would virtually always warrant abstention because agency proceedings generally involve an interest in some way related to the state's police power – as is apparent from the Court of Appeals' conclusion that the proceedings here did so, even though they consisted of an adjudication between two private parties regarding the terms of their contractual agreement. And even after agency action was final, federal courts would still be forced to abstain because state judicial review would be seen as a mere continuation of the agency proceeding. Moreover, under the Court of Appeals' reasoning and Circuit precedent, abstention would be required regardless of whether state-court review was pending or merely available. *See Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1144 (8th Cir. 1990) ("a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies"); Pet. App. 6a ("Interests of comity and federalism support federal abstention where state judicial review of the IUB's order has not yet been completed.").

Yet the federal courts can entertain challenges to final state agency action without intruding on the state courts' ability "to perform their separate functions." *Younger*, 401 U.S. at 44. That is so regardless of whether the agency made its decision through an adjudicative process. Indeed, in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002),

this Court confirmed that a federal court had federal-question jurisdiction to review the Maryland Commission's order involving intrastate telephone rate regulation for compliance with federal law, even though that order was issued through an adjudicative process similar to the one the IUB used here. *Id.* at 642. It explained that courts reviewing agency action are *not* acting as appellate courts. *Id.* at 644 n.3. And it said not one word about abstention or comity, even though Commission orders are without doubt reviewable by the Maryland state courts. *See* Md. Code, Pub. Utils. § 3-204.

Because the Court of Appeals erred in holding that *Younger* required abstention, the Court of Appeals' decision should be reversed and the case remanded.

ARGUMENT

I. ABSTENTION IS JUSTIFIED ONLY IN EXCEPTIONAL CIRCUMSTANCES.

Abstention is a judicial doctrine crafted against a backdrop in which "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *NOPSI*, 491 U.S. at 358-59. Thus, this Court has long held that a federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts

have a "virtually unflagging" obligation "to adjudicate claims within their jurisdiction." *NOPSI*, 491 U.S. at 359 (internal quotation marks omitted).

Accordingly, a plaintiff may press a claim in federal court in preference to state court, even when the state court would also be capable of adjudicating the claim. *See, e.g., Willcox v. Consol. Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909) ("The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."); 28 U.S.C. § 1332. Moreover, there is no general rule requiring federal courts to abstain from the exercise of jurisdiction in favor of a parallel proceeding pending in state court. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . .'") (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)); *id.* at 816 ("the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction."). In circumstances involving such parallel litigation, preclusion doctrines require the later-deciding court to be bound by the judgment of the first-deciding court. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005).

Abstention represents an "extraordinary and narrow exception" to this general framework. *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). The Court has found abstention to be warranted only in four limited categories of cases.

The first, *Pullman* abstention, is a constitutional avoidance doctrine. In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Court found abstention to be appropriate when a parallel state-court action raised unsettled questions of state law, the resolution of which could allow the federal court to avoid confronting a constitutional question.

The second, *Burford* abstention, involves federal claims of minimal importance, the resolution of which by federal courts would significantly disrupt a complex regulatory framework established under state law. Thus, in *Burford*, 319 U.S. 315, the Court held that the federal court should abstain from adjudicating a fact-bound due process claim concerning the issuance by a Texas Commission of a permit to drill an oil well. Federal-court adjudication of the due process claim would have threatened to disrupt Texas's complex and carefully calibrated scheme for issuing drilling permits.

The third category, referred to as *Younger* abstention, is grounded in principles of comity between federal and state courts, and requires federal courts to abstain from undue interference with an ongoing state judicial proceeding

concerning an important state interest. *Younger*, 401 U.S. 37. *Younger* itself concerned a plaintiff's suit to enjoin an ongoing state criminal prosecution on constitutional grounds. This Court later extended *Younger* to civil enforcement proceedings analogous to criminal prosecutions, such as proceedings to enforce a nuisance statute barring exhibition of obscene films, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975), and proceedings to enforce a State's anti-discrimination laws. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). It has also applied *Younger* to cases "involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *NOPSI*, 491 U.S. at 368. For example, in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the Court held that a federal court should abstain in favor of an ongoing state proceeding to challenge a state bond provision used to "compel[] compliance with the judgments of the [state's] courts." *Id.* at 13-14. Similarly, in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court held that a federal court should not interfere in ongoing state bar disciplinary proceedings, which were held under the auspices of the State Supreme Court. *Id.* at 425. However, the Court has never applied *Younger* outside the context of a state proceeding that was coercive in nature or related to a state court's power to effectuate its judgments. Nor has it ever applied *Younger* to the judicial review

of a state administrative proceeding that had resulted in final agency action.

Finally, the fourth category, known as *Colorado River* abstention, requires dismissal of a federal suit in favor of a concurrent state-court suit, but only in "exceptional" circumstances "for reasons of wise judicial administration." *Colorado River*, 424 U.S. at 818. The Court has emphasized, however, that those circumstances "are considerably more limited than the circumstances appropriate for abstention" under other doctrines. *Id.*

II. THE COURT OF APPEALS ERRED IN INVOKING *YOUNGER* ABSTENTION.

A. The State's Interest In Judicial Review of Agency Decisions Does Not Warrant *Younger* Abstention.

In concluding that abstention was warranted in this case, the Court of Appeals relied upon the test for *Younger* abstention articulated by this Court in *Middlesex County*. Pet. App. 5a. There the Court held that abstention is warranted where: (1) there is "an ongoing state judicial proceeding" that (2) "implicates important state interests," and (3) the state proceedings provide "an adequate opportunity to raise constitutional challenges." *Middlesex County*, 457 U.S. at 432.

According to the Court of Appeals, *Younger* abstention was required in this case in light of the State's important interest in the "regulation of intrastate utility rates." Pet. App. 8a. But

that interest had no relevance in the pending state proceeding. The only "ongoing state judicial proceeding," *Middlesex County*, 457 U.S. at 432, was the state court's review of the IUB decision. The state court does not itself engage in any local telephone regulation. Rather, it reviews the lawfulness of the *IUB's* regulation. And *NOPSI* makes clear that the State's interest in having its own courts review the decisions of its administrative agencies is not sufficiently important to justify abstention. As this Court held in *NOPSI*, "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *NOPSI*, 491 U.S. at 368.

That is so even though state agency proceedings frequently – indeed, typically – involve the administration of regulatory schemes lying at the heart of the police power. Regardless of whether comity may require a federal court to abstain from interfering with the state administrative proceeding *before* the agency has committed to take any particular action, *see Dayton*, 477 U.S. at 628, comity does not require abstention *after* the agency has committed to act. While a federal-court decision might result in nullification of a state law or policy, and might collaterally estop the state court from reaching a contrary conclusion, those consequences are routine in federal litigation and cannot justify abstention. *Every* case that includes a federal challenge to state law touches upon such an

interest. *See NOPSI*, 491 U.S. at 373 ("It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future – or, as in the present circumstances, even a pending – state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts.").

NOPSI itself involved the same police power at issue here: regulation of utilities. Indeed, except for the fact that the IUB decision at issue was rendered through an adjudication, this case is identical to *NOPSI*. But the Court in *NOPSI* found no need to abstain *after* the agency action was complete merely because state courts were reviewing the agency's decision. *See NOPSI*, 491 U.S. at 372 ("As a challenge to completed legislative action, NOPSI's suit [does not] interfere[] with ongoing judicial proceedings against which *Younger* was directed."). As the Court explained in *NOPSI*, "[s]uch a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368.

This Court had previously reached a similar conclusion in *Prentis*. There, the Court held that federal courts should not intervene during the state's ratemaking process because the State should be permitted to complete that process before it was challenged. *See Prentis v. Atl.*

Coast Line Co., 211 U.S. 210, 230 (1908) (cited by *NOPSI*, 491 U.S. at 372).[2] Once the ratemaking had ended, however, there was no longer any reason for federal courts to refrain from action. *Id.* at 230; *see also NOPSI*, 491 U.S. at 372-73 (discussing *Prentis*). The same is true here.

To be sure, this case involves an underlying state agency adjudication, which *NOPSI* did not – a fact on which the Court of Appeals placed great emphasis. *Cf.* Pet. App. 8a-9a. But that factual distinction should not change the analysis. The importance of the state interest in *reviewing* an agency decision does not change depending on whether the state agency chooses to regulate by way of adjudication or rulemaking. Indeed, agencies often enjoy substantial discretion to determine the method they will use to make policy, *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153-54 (1991), and it would be odd – and potentially create perverse incentives for a state agency that

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[2] This Court pointed to a similar interest as part of the justification for abstention in *Dayton*, which is the only *Younger* abstention case decided by this Court involving a state agency proceeding in which the agency was not acting under the auspices of the courts. The agency proceeding in *Dayton* was ongoing, and no final agency action had been taken. The Court explained that principles of comity do not permit a federal court to interfere with a state agency's "mere exercise of jurisdiction," when the state agency had not yet committed itself to any action. *Dayton*, 477 U.S. at 628.

wished to avoid a federal-court challenge – if *Younger* abstention turned on the agency's choice of regulatory method.

B. The Underlying IUB Proceeding Cannot Justify Abstention Because It Has Been Completed.

Rather than analyze the importance of the State's interest in *reviewing* final action taken by a state administrative agency, the Court of Appeals instead treated the IUB proceeding and the state-court review proceeding as unitary, and viewed the relevant state interest as the one presented by the IUB proceeding. *See* Pet. App. 8a (describing "the generic proceedings" at issue as "involv[ing] the state's regulation of intrastate utility rates").

The Court of Appeals employed a two-step chain of logic in concluding that the relevant state interest was the one at issue in the IUB proceeding. First, it reasoned – drawing on Circuit precedent – that "once a party initiates state judicial proceedings in which the state has an important interest, the party must follow the proceedings through to the end." Pet. App. 4a (citing *Alleghany Corp.*, 896 F.2d at 1144). Second, it characterized the IUB proceeding as a "judicial proceeding" on the ground that it "attempts to enforce liabilities based on present facts and existing laws." Pet. App. 9a. Thus, the Court of Appeals concluded, "[i]nterests of comity and federalism support federal abstention where state judicial review of the IUB's order

has not yet been completed." Pet. App. 6a. The Court of Appeals erred, however, in treating the two proceedings as unitary.

1. The State Had No Continuing Interest in the Regulation of Intrastate Utility Rates.

As an initial matter, the actual state interest articulated by the Court of Appeals in this case – the "regulation of intrastate utility rates," Pet. App. 8a – could only have been implicated if the IUB proceedings were *not* entirely judicial. As this Court held in *NOPSI*, ratemaking is a legislative function, not a judicial one, *see NOPSI*, 491 U.S. at 371-72, and a completed ratemaking proceeding is not the kind of proceeding to which *Younger* abstention can apply. *Id.* at 372-73. And that is so regardless of whether rates are set through a contested proceeding or otherwise. *See Prentis*, 211 U.S. at 226-27.

Conversely, if the IUB proceedings could be described as entirely judicial merely because they involved the resolution of liabilities based upon existing facts and law, Pet. App. 9a, then the IUB proceedings did not involve the ratemaking interest on which the Court of Appeals relied. Instead, the State's interest in the IUB proceeding would have been the same interest the State possesses in adjudicating any contractual dispute between two private parties. And that interest has never been held sufficient

to warrant *Younger* abstention. *See infra* Part II.C.

In any event, even if the State's interest in the legislative activity of ratemaking could somehow have been implicated by the IUB proceeding in this case, that interest was no longer at stake once the IUB issued its final order. Under Iowa law, state courts enjoy only judicial power, not legislative or executive power. *E. Buchanan Tel. Coop. v. Iowa Utilities Bd.*, 738 N.W.2d 636, 641 (Iowa 2007). They thus cannot engage in the legislative function of ratemaking. As a result, once the IUB proceeding had concluded, Iowa had no interest in protecting the integrity of "a unitary and still-to-be completed" ratemaking process. *NOPSI*, 491 U.S. at 372. The ratemaking process had ended.

Indeed, the analysis in this case should be the same as that in *NOPSI*, which involved an asserted state interest identical to the one invoked by the Court of Appeals in this case. *See id.* at 365 (describing the interest at issue in *NOPSI* as one "in regulating intrastate retail rates"). The Court concluded there:

> As a challenge to completed legislative action, NOPSI's suit represents neither the interference with ongoing judicial proceedings against which *Younger* was directed, nor the interference with an ongoing legislative process against which our ripeness holding in *Prentis* was directed. It is, insofar as our policies of

> federal comity are concerned, no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance – which we would assuredly not require to be brought in state courts.

Id. at 372.

2. Litigation From an Agency to a Court Should Not Be Treated as a Unitary Process When the Important State Interest Justifying Abstention at the Agency Stage Does Not Persist at the Appellate Stage.

The Court of Appeals nevertheless was led to treat the IUB proceeding as an "ongoing" judicial proceeding as a result of Circuit precedent applying this Court's decision in *Huffman*, 420 U.S. 592. In that case, a federal court had enjoined a State from executing a state-court judgment; the judgment could have been appealed to the State's appellate courts, but the challenger chose to go to federal court instead. The Court held that the federal court should have abstained rather than having intervened "in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." *Id.* at 609. This is because "the State's trial-and-appeals process" should be treated "as a unitary system," so that it would be improper "for a federal court to disrupt its integrity by intervening in mid-process," *NOPSI*, 491 U.S. at 369.

The Eighth Circuit has previously extended *Huffman* to the agency context in *Alleghany Corporation*. It analogized a state agency adjudication to a state trial-court proceeding, and concluded that in either situation, "a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies." 896 F.2d at 1144.[3]

The logic of treating the trial and appellate courts as unitary, however, rests on the notion that the same important state interest is present at each stage. In *Huffman*, the Court explained that "[v]irtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or prior to trial." 420 U.S. at 608. Thus, federal intervention in the appellate proceedings would not have been "any the less a disruption of the State's efforts to protect interests which it deems important." *Id.*

This Court has never accepted the much broader proposition that, whatever the state

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[3] The circuits are in conflict over whether *Huffman* applies only to decisions by state trial courts, or whether it also applies to decisions by state administrative agencies. *Compare, e.g., Alleghany Corp.*, 896 F.2d at 1144; *O'Neill v. City of Phila.*, 32 F.3d 785, 791 (3d Cir. 1994); *Moore v. City of Asheville*, 396 F.3d 385, 395-96 (4th Cir. 2005), with *Thomas v. Tex. State Bd. of Med. Examiners*, 807 F.2d 453, 456 (5th Cir. 1987); *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 926 F.2d 567, 572-73 (6th Cir. 1991).

interests at stake in each stage, "the litigation from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no more permitted at the conclusion of the administrative stage than during it." *NOPSI*, 491 U.S. at 369. Nor should the Court accept that proposition here, where the ratemaking interest that might have justified abstention at the agency stage no longer is implicated, now that the agency has acted and the matter is being reviewed in the courts. For abstention to be justified under *Younger*, there must be an important state interest at stake in the *ongoing* process above and beyond that which would exist in every state appellate proceeding. Otherwise, federal courts would regularly be forced to abstain from hearing preemption or constitutional challenges to state agency decisions.

This Court's decision in *Verizon Maryland* underscores the inappropriateness of treating a state agency proceeding and state-court judicial review as a unitary process. There, as here, the state agency issued an adjudicative administrative decision that was being challenged in federal court on preemption grounds. The only potentially relevant factual difference between the two cases is that in *Verizon* there was no state court action pending, a difference to which the Eighth Circuit points. Pet. App. 5a

n.2.[4] But, if one accepts (as the Eighth Circuit does) that, once begun, an adjudicative agency proceeding must be allowed to continue through the state appellate process, that difference is irrelevant. According to the Eighth Circuit's reasoning, Verizon should have had an obligation to "follow the [state] proceedings through to the end." Pet. App. 4a.

Yet nothing in this Court's opinion in *Verizon Maryland* even hints at such a notion. Quite to the contrary, the Court went out of its way to distinguish appellate review of trial-court decisions from "judicial review of executive action, including determinations made by a state administrative agency." 535 U.S. at 644 n.3.

Rather than assess whether the State's interest in regulating intrastate utility rates persisted once the IUB's action was complete, the Court of Appeals instead analyzed the case in formalistic terms: because the IUB proceedings were adjudicatory, they must be considered "judicial proceedings" akin to trial-court proceedings. Pet. App. 8a-9a. That analysis fails even if evaluated purely on its own terms. Although the IUB conducts adjudications, it has no judicial power at all and thus could not have

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[4] The version of the Court of Appeals opinion set forth in Petitioner's Appendix contains a typo. There are two footnotes enumerated as footnote 1. As a result, the footnote appearing on page 5a is enumerated footnote 2. In the original reported decision, that footnote is footnote 3.

rendered a judicial decision that was part of a unitary judicial process. As the Iowa Supreme Court has explained, "the board [is] an administrative agency within the Executive Branch of state government," and thus "has no authority to grant judicial remedies." *E. Buchanan Tel. Coop.*, 738 N.W.2d at 641.[5]

In sum, the Court of Appeals erred by treating the agency proceeding and the state-court review proceeding as a unitary process presenting the same important state interest in the regulation of utility rates. Federal-court action will not interfere with the IUB proceeding, because it is no longer ongoing. And because Iowa courts have no power to regulate rates, once the IUB proceeding had concluded, Iowa had no interest in protecting the integrity of "a unitary and still-to-be completed" ratemaking

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[5] This Court similarly explained just last Term that while the decisions of federal agencies "take 'legislative' and 'judicial' forms, . . they are exercises of – indeed, under our constitutional structure they *must be* exercises of – the 'executive Power.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013). Likewise, in *Verizon Maryland*, the Court described "determinations made by a state administrative agency" as "executive action." 535 U.S. at 644 n.3. It thus held that when a federal trial court reviews the decision of a state agency, it is not acting in an appellate capacity. *Id.*; *see also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238-39 (1984) (holding that Hawaii Housing Authority administrative process that designated certain properties for eminent domain were not judicial proceedings subject to *Younger* abstention).

process. *NOPSI*, 491 U.S. at 372. Nor can abstention be justified on the ground that the state-court proceedings are akin to appellate review of a trial court decision. This Court has never held, and should not hold, that an agency proceeding and judicial review necessarily constitute a unitary process, especially where the state interest at the agency stage is not implicated at the judicial stage.

C. The IUB Proceedings Were Not Themselves the Kind of Judicial Proceedings To Which *Younger* Abstention Applies.

Finally, even if the Court of Appeals had correctly focused on the IUB proceedings as the relevant ones for *Younger* purposes, it erred in concluding that those proceedings were ones to which *Younger* applies. Under the Court of Appeals' approach, abstention would apply to virtually all agency adjudications (and judicial review of those adjudications). But this Court has never applied abstention so broadly.

This Court has applied *Younger* to state agency proceedings on only two occasions: in *Dayton* and *Middlesex*, and in one of those, the proceedings were conducted under the auspices of the State Supreme Court's authority to regulate the conduct of the attorneys practicing before it and the State's lower courts. *Middlesex County*, 457 U.S. at 433-34. The other, *Dayton*, was predicated in part on an interest similar to that which existed in *Prentis*, in the completion of

agency action prior to federal-court intervention. *See supra* at 11-12.

Significantly, both *Dayton* and *Middlesex County* were enforcement proceedings. *Dayton* involved an enforcement action brought by the State to vindicate an important state interest in "the elimination of prohibited sex discrimination." 477 U.S. at 628. *Middlesex County* involved disciplinary proceedings conducted to regulate the conduct of the attorneys practicing before the state's courts. *Middlesex County*, 457 U.S. at 433-34.

That is consistent with this Court's *Younger* jurisprudence more generally. Contrary to the Court of Appeals' holding, this Court has applied *Younger* abstention only to a subset of judicial proceedings: those involving a state's coercive enforcement of its laws. *See Dayton*, 477 U.S. at 627 n.2 (drawing a distinction between "coercive" proceedings, to which *Younger* applies, and "remedial" proceedings, to which it does not).

Younger itself involved a federal-court injunction that had been issued against a state criminal prosecution. 401 U.S. at 49. The Court first extended *Younger* beyond the criminal context in *Huffman*, in which the Court applied *Younger* to a civil enforcement proceeding that was "more akin to a criminal prosecution than are most civil cases." *Huffman*, 420 U.S. at 604. The case involved an enforcement action brought under the state nuisance law against the owner of a pornographic theatre. The Court reasoned

that the civil enforcement proceeding "is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." *Id.* Accordingly, a federal-court injunction disrupting the state proceeding "has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." *Id.* at 605; *see also Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (applying *Younger* to "civil enforcement action" to recover fraudulently obtained welfare payments – conduct which was a crime under state law); *Moore v. Sims*, 442 U.S. 415, 423 (1979) (applying *Younger* abstention to civil proceeding for the temporary removal of a child during child-abuse investigations, a proceeding that is "in aid of and closely related to criminal statutes" (quotation marks omitted)).

The Court subsequently extended *Younger* to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *NOPSI*, 491 U.S. at 368. For example, in *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977), the Court applied *Younger* to civil contempt proceedings, "through which [the State] vindicates the regular operation of its judicial system." *Id.* at 335. The

Court reasoned that, although the State's interest in civil contempt proceedings was not "quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*, . . . we think it is of sufficiently great import to require application of the principles of those cases. The contempt power lies at the core of the administration of a State's judicial system." *Id.*

Likewise, in *Pennzoil*, a case at the far edge of this Court's *Younger* cases, the Court applied *Younger* to a challenge to a State's appeal bond and judgment lien provisions. The Court reasoned that, like *Juidice*, that case challenged "the processes by which the State compels compliance with the judgments of its courts." *Pennzoil*, 481 U.S. at 13-14.

Significantly, this Court has never applied *Younger* so broadly as to encompass even all proceedings in which the State is a party, let alone all proceedings between private parties such as the IUB proceeding here. *See Moore*, 442 U.S. at 423 n.8 ("[W]e do not remotely suggest that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies.") (internal quotation marks omitted).

In fact, this Court has found abstention to be *unwarranted* in a case similar to this one. In *Public Utilities Commission of Ohio v. United*

Fuel Gas Co., 317 U.S. 456, 468-69 (1943), this Court held that there was no reason a federal court should abstain from resolving a straightforward preemption claim even though it would have impacted a *pending* state ratemaking proceeding. *Id.* (cited in *NOPSI*, 491 U.S. at 362-63). The Court noted "that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction." *Id.*[6] But it explained that "this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." *Id.* In other words, the existence of a ratemaking interest did not alone suffice to justify abstention in the face of a facial preemption challenge.

In sum, *Younger* abstention is not warranted simply because there is an ongoing proceeding in which the court has a regulatory interest. Rather, to justify *Younger* abstention, the state must have an interest related to enforcement.

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[6] The agency proceeding there was legislative, but federal courts are no less wary of interrupting ongoing state legislative processes as they are of interrupting ongoing state judicial processes, as *Prentis* shows.

And such an interest is present only in certain types of proceedings: criminal proceedings, such as those in *Younger* itself; civil enforcement proceedings intertwined with the enforcement of criminal law, as in *Huffman*, *Trainor*, and *Moore*, or particularly important state public policies, as in *Dayton*; civil enforcement proceedings that seek to vindicate the power of the courts to effectuate their judgments and to discipline their attorneys, as in *Juidice* and *Middlesex County*; and, at the outer reaches, civil proceedings that touch on a court's ability to enforce its judgments, as in *Pennzoil*.

The proceeding here falls well outside the types of judicial proceedings to which this Court has applied *Younger*. The proceeding was initiated by Sprint, not by the State, and it involved a commercial dispute between Sprint and Windstream, another private party, concerning access charges that Windstream had imposed on Sprint. J.A. 4a. Whatever the outer bounds of *Younger* abstention may be, a commercial dispute between two private parties lies far outside them.

III. *BURFORD* IS THE ABSTENTION DOCTRINE RELEVANT TO THIS CASE, BUT ABSTENTION WOULD BE INAPPROPRIATE UNDER THAT FRAMEWORK AS WELL.

The sort of analysis undertaken by the Court of Appeals would undermine the approach this Court has followed to evaluate precisely the sort

of state interest on which the Court of Appeals relied here. To the extent that any abstention doctrine is potentially relevant in this case, it is *Burford* abstention. In contrast to *Younger* abstention, which is focused on a State's interest in carrying out coercive enforcement actions free of federal interference, *Burford* abstention is focused on a State's interest in executing a complex and detailed regulatory scheme requiring significant state expertise, which could be undermined through federal-court involvement. Specifically, *Burford* requires a federal court to abstain from interfering with the proceedings of state administrative agencies "(1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814).

Abstention under *Burford* would not be warranted here. Yet the Court of Appeals, by expanding *Younger* abstention far beyond its proper bounds, displaced the *Burford*-type analysis that should have been applied in this case.

A. *Burford* Abstention.

In *Burford*, Sun Oil Co. filed suit in federal court, claiming that the Texas Railroad Commission had violated due process and state law when it granted an oil drilling permit to a third party. That suit took place against a backdrop in which the federal government had left "the principal regulatory responsibility [over the complex process of delegating oil extraction rights] with the states." *Burford*, 319 U.S. at 319.

Texas had "very large" interests in the regulation of oil and gas extraction, given "the impact of the industry on the whole economy" and the need to balance concerns about "oil supply," "market demand," "protection of the individual operators," and "protection of the public interest." *Id.* at 319-20.

To effectuate these interests, the Texas Railroad Commission oversaw the spacing of wells drilled from shared underground oil and gas pools. Due to the geologic nature of these pools, which often spanned many miles across multiple owners' tracts of land, extracting oil or gas from one well could result in a shift of pressure, oil, or gas across the rest of the pool. Thus, the Commission needed to exercise central authority over all extraction decisions in order to prevent waste and to ensure that each owner recovered a quantity of oil and gas substantially equal to the amount that was initially recoverable under his or her land. *Id.* at 320-22.

Although the minimum spacing of wells was generally governed by a rule promulgated by the Commission, the Commission issued numerous exceptions in light of the geological complexity of well extraction. These exceptions had historically been litigated in a single Texas state court, to ensure uniformity and centralization. *Id.* at 325.

In *Burford*, this Court evaluated whether a federal court should abstain from deciding a due process challenge to a decision of the Railroad Commission to grant an oil drilling permit. *Id.* at 331. Resolution of that question would have required the Court to untangle complex issues related to Texas' regulatory scheme: "the question [was] whether the commission had properly applied Texas' complex oil and gas conservation regulations." *NOPSI*, 491 U.S. at 360.

The Court determined that "questions of regulation of the industry by the State administrative agency . . . so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." *Burford*, 319 U.S. at 332. The Court added that "[c]onflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." *Id.* at 334. Given the longstanding federal deference to states to regulate oil and gas extraction; the well-developed and complex state regulatory scheme; the relative expertise of the Texas courts in resolving

disputes over exceptions to the commission's rules; and the minimal importance of the federal issue, which was fact-bound and entangled with difficult issues of state law, the Court determined that federal abstention was warranted.

B. Abstention Would Not Be Warranted Under *Burford*.

The general fact pattern in this case – review of a decision by a state agency charged with administering a complex regulatory area of local importance – fits the general pattern of *Burford* cases, not *Younger* cases. But *Burford* abstention in this case is not warranted, either.

The underlying legal question at issue here – whether States have authority to impose intrastate access charges to Voice over Internet Protocol (VoIP) calls – is purely a federal question that is not particular to Iowa nor uniquely wrapped up in questions specific to Iowa's local tariffing scheme over which Iowa courts might have a comparative advantage. And the question is one of substantial federal importance, going to the basic division of authority between state and federal authorities under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Moreover, the basic regulatory scheme under the Telecommunications Act unquestionably is one in which the FCC and federal courts have a significant role even with respect to intrastate communications. *See generally AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999).

This is not an area in which state regulation is limited only by due process and similar constitutional concerns.

In *NOPSI*, this Court found that a state interest virtually identical to the one at issue here was insufficient to warrant *Burford* abstention. The Court considered whether abstention was required with respect to a claim that federal law preempted a rate adjustment made by the local ratemaking body with respect to a particular utility. 491 U.S. at 352-57.

In finding abstention unwarranted, this Court explained that where "no inquiry beyond the four corners" of a state agency's order is needed to determine "whether it is facially preempted" by federal law, "such an inquiry would not unduly intrude into the process of state government or undermine the State's ability to maintain desired uniformity" *Id.* at 363.

The same analysis applies here. "[F]ederal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem," *NOPSI*, 491 U.S. at 362 (internal quotation marks omitted), because the question of whether VoIP regulation is preempted is a national problem where uniformity of law is a national, not local, concern.

To be sure, a federal (or state) decision finding state regulation to be preempted potentially could disrupt Iowa's interest in

regulating telecommunications within the state. But as *NOPSI* explained, although *Burford* protects "complex state administrative processes from undue federal influence, it does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law and policy." *NOPSI*, 491 U.S. at 362 (internal quotation marks omitted).

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be reversed and the case remanded.

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., PETITIONER

v.

ELIZABETH S. JACOBS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 21 OTHER STATES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether *Younger* abstention is categorically inappropriate whenever the related state proceeding is "remedial" in nature.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 4

I. For more than 200 years, Congress and this Court have generally barred federal courts from enjoining state judicial tribunals. 4

II. Neither the principles underlying the *Younger* abstention doctrine nor this Court's decisions support allowing federal courts to enjoin "remedial" state proceedings. 9

A. The *Younger* doctrine's purposes are served by applying the doctrine to federal actions that seek to enjoin "remedial" state proceedings 9

B. This Court's decisions do not support excluding "remedial" state-court proceedings from the *Younger* doctrine's protections. 17

C. Applying the *Younger* doctrine to federal actions that seek to enjoin "remedial" state proceedings does not sweep too far. ... 23

III. *Younger* abstention, not *Burford* abstention, applies to this case. 27

Conclusion 30

Additional Counsel 31

TABLE OF AUTHORITIES

Cases

Ankenbrandt v. *Richards*,
504 U.S. 689 (1992) 20

Arizona v. *United States*,
__ U.S. __, 132 S. Ct. 2492 (2012) 7

Atlantic Coast Line R.R. Co. v. *Brotherhood of Locomotive Engineers*,
398 U.S. 281 (1970) 5

BellSouth Telecomms., Inc. v. *Kentucky Pub. Serv. Comm'n*,
669 F.3d 704 (6th Cir. 2012) 24

Brown v. *Day*,
555 F.3d 882 (10th Cir. 1989) 16

Burford v. *Sun Oil Co.*,
319 U.S. 315 (1943) 27, 28

Central Va. Community College v. *Katz*,
546 U.S. 356 (2006) 21

Colorado River Water Conservation Dist. v. *United States*,
424 U.S. 800 (1976) 8, 27

Entergy v. *Nebraska*,
210 F.3d 887 (8th Cir. 2000) 7

Exxon Mobil Corp. v. *Saudi Basic Industries Corp.*,
544 U.S. 280 (2005) 5, 25

Gibson v. *Berryhill*,
411 U.S. 564 (1973) 7

Hudson v. *Campbell*,
663 F.3d 985 (8th Cir. 2011) 2

Huffman v. *Pursue, Ltd.*,
420 U.S. 592 (1975) ..... passim

Illinois Bell Tel. Co. v. *Box*,
548 F.3d 607 (7th Cir. 2008) 24

Juidice v. *Vail*,
430 U.S. 327 (1977) 10, 18, 19

Kerr-McGee Chemical Corp. v. *City of West Chicago*,
914 F.2d 820 (7th Cir. 1990) 7

Kremer v. *Chemical Constr. Corp.*,
456 U.S. 461 (1982) 6

Kugler v. *Helfant*,
421 U.S. 117 (1975) 23

Majors v. *Engelbrecht*,
149 F.3d 709 (7th Cir. 1998) 2

Mann v. *Conlin*,
22 F.3d 100 (6th Cir. 1994) 14

Maymo-Melendez v. *Alvarez-Ramirez*,
364 F.3d 27 (1st Cir. 2004) 2

Middlesex County Ethics Comm'n v. *Garden State Bar Ass'n*,
457 U.S. 423 (1982) 3, 10, 17, 18

Mitchum v. *Foster*,
407 U.S. 225 (1972) 6, 26

Moore v. *Sims*,
442 U.S. 415 (1979) 12, 22, 23

Morrow v. *Winslow*,
94 F.3d 1386 (10th Cir. 1996) 13

New Orleans Public Service Inc. v. *Council of the City of New Orleans* ("*NOPSI*"),
491 U.S. 350 (1989) ..... passim

Norfolk & W. Ry. Co. v. *Pub. Utils. Comm'n*,
926 F.2d 567 (6th Cir. 1991) 2

O'Neill v. *City of Philadelphia*,
32 F.3d 785 (3rd Cir. 1994) 2

Ohio Civil Rights Comm'n v. *Dayton Schools*,
477 U.S. 619 (1986) ..... passim

Patsy v. *Florida Board of Regents*,
457 U.S. 496 (1982) 20

Pennzoil Co. v. *Texaco Inc.*,
481 U.S. 1 (1987) ..... passim

Robb v. *Connolly*,
111 U.S. 624 (1884) 12

SMA Life Assurance Co. v. *Sanchez-Pica*,
960 F.2d 274 (1st Cir. 1992) 7

Southwestern Bell Tel., L.P. v. *Missouri Pub. Serv. Comm'n*,
461 F. Supp. 2d 1055 (E.D. Mo. 2006) 24

Tafflin v. *Levitt*,
493 U.S. 455 (1990) 12

Talk America v. *Michigan Bell Tel. Co.*,
131 S. Ct. 2254 (2011) 24

Taylor v. *Carryl*,
61 U.S. 583 (1857) 5

Thomas v. *Tex. State Bd. of Med. Examiners*,
807 F.2d 453 (5th Cir. 1987) 2

Trainor v. *Hernandez*,
431 U.S. 434 (1977) 10, 14, 22

U.S. Fidelity & Guaranty Co. v. *Lee Investments LLC*,
641 F.3d 1126 (9th Cir. 2011) 7

Verizon Maryland Inc. v. *Public Serv. Comm'n of Md.*,
535 U.S. 635 (2002) ..... passim

Webster v. *Fall*,
266 U.S. 507 (1925) 21

Younger v. *Harris*,
401 U.S. 37 (1971) ..... passim

Statutes

20 U.S.C. § 1415(i)(2)(A) 24

28 U.S.C. § 1257 5

28 U.S.C. § 1330 25

28 U.S.C. § 1331 5

28 U.S.C. § 1738 6

28 U.S.C. § 2283 ..... passim

29 U.S.C. § 722(c)(5)(J) 24

33 U.S.C. § 1365 24

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 7604 24

47 U.S.C. § 152(b) 22

47 U.S.C. § 252(e)(6) 23

47 U.S.C. § 332(c)(7)(B)(v) 24

Rules

S. Ct. R. 14.1(a) 15

INTEREST OF *AMICI CURIAE*

When seeking to vindicate federal rights and interests, the federal government must "always endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). This principle is particularly true with respect to state judicial systems. The Constitution requires state courts and administrative agencies to resolve issues of federal law and assumes they will do so competently and in good faith. For that reason, our nation has a long legal tradition of federal courts declining to enjoin ongoing state judicial proceedings, even when litigants assert that the state proceeding runs afoul of federal law. The *Younger* abstention doctrine is part and parcel of that long tradition.

The *amici* states have an abiding interest in defending the role their judicial systems play, and in protecting those systems from unwarranted aspersions on their competence to adjudicate federal issues. Petitioner Sprint Communications Company, L.P. asks this Court to narrow the scope of the *Younger* doctrine to exclude an entire class of state judicial proceedings, those that Sprint labels "remedial." Such a categorical narrowing runs counter to the state-court deference that *Younger* contemplates. Accordingly, the *amici* states oppose Sprint's effort to weaken the *Younger* doctrine and the comity and federalism interests the doctrine advances.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sprint asks the Court to adopt a new limitation on the *Younger* abstention doctrine, a limit that would authorize federal courts to enjoin ongoing state judicial proceedings whenever the state proceeding can be categorized as "remedial" in nature. In considering that invitation, it is important to understand precisely what rule Sprint is—and is not—requesting.

Critically, Sprint does not ask this Court for a rule specific to state administrative proceedings in which the state agency issued an appealable final order. In *New Orleans Public Service Inc.* v. *Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350 (1989), this Court left open whether "litigation, from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no more permitted at the conclusion of the administrative stage than during it." *Id.* at 369 & n.4. And the lower courts are divided on that issue.[1] But Sprint did not seek certiorari on that question. In fact, Sprint does not ask for a rule specific to state administrative proceedings at all.

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[1] Compare *Maymo-Melendez* v. *Alvarez-Ramirez*, 364 F.3d 27, 35 (1st Cir. 2004) (*Younger* applies to administrative actions that have become final); *O'Neill* v. *City of Philadelphia*, 32 F.3d 785, 790–91 (3rd Cir. 1994) (same); *Majors* v. *Engelbrecht*, 149 F.3d 709, 713 (7th Cir. 1998) (same); *Hudson* v. *Campbell*, 663 F.3d 985, 988 (8th Cir. 2011) (same), with *Thomas* v. *Tex. State Bd. of Med. Examiners*, 807 F.2d 453, 456 (5th Cir. 1987) (*Younger* does not apply in that situation); *Norfolk & W. Ry. Co.* v. *Pub. Utils. Comm'n*, 926 F.2d 567, 572 (6th Cir. 1991) (same).

Instead, Sprint insists that this Court has already established that the *Younger* doctrine, *en toto*, is inapplicable whenever the state proceeding sought to be enjoined can be categorized as "remedial." Pet. Br. 29. The rule Sprint proposes—based on the coercive/remedial dichotomy—therefore stands or falls on whether that rule works, as a matter of principle and precedent, when a federal court is asked to enjoin a state proceeding that is still in progress.

Sprint's proposed limitation of *Younger* fails that test because *Younger*'s core principles (respect for state judicial systems, avoiding duplicative legal proceedings, and ensuring states can effectuate their substantive policies) are equally applicable to so-called "remedial proceedings" in which important state interests are involved. Consider a federal-court injunctive request grounded on the Medicaid Act, seeking to prevent a state administrative law judge from ruling regarding an applicant's entitlement to assisted-living-related Medicaid waiver services. This is a proceeding that Sprint would characterize as remedial, yet every interest *Younger* seeks to advance is implicated by the threat of a federal injunction.

Sprint's proposed limitation also conflicts with this Court's precedents, which have applied *Younger* abstention to civil cases that are not enforcement proceedings, e.g., *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1 (1987), and which have set out a general test that encompasses remedial proceedings. *Middlesex County Ethics Comm'n* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982). Sprint relies heavily on *Verizon Maryland Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002), but that case did not address *Younger* abstention.

Nor is Sprint correct that, absent an enforcement limitation, *Younger* abstention sweeps too broadly. The doctrine contains several important exceptions, does not apply to agency actions that are legislative in nature, and is sometimes overridden by federal laws that expressly authorize federal-court review of agency actions. This Court does not need to exclude "remedial" cases from the doctrine's scope to keep it properly confined.

In sum, Sprint's test violates the federalism principles this Court established unequivocally in *Younger* and reaffirmed in later cases. The Court should reject Sprint's invitation to adopt a remedial-proceedings exception to *Younger* and should instead affirm the judgment of the Eighth Circuit.

ARGUMENT

I. For more than 200 years, Congress and this Court have generally barred federal courts from enjoining state judicial tribunals.

Sprint has asked a federal district court to enjoin a state judicial tribunal from enforcing its ruling. J.A. 9a ("Plaintiffs pray that the Court enter an order: . . . . Entering preliminary and permanent injunctive relief enjoining all defendants from enforcing the IUB's Order to the extent contrary to federal or Iowa law."). That request goes against this nation's long tradition of barring federal-court interference with ongoing state judicial proceedings.

More than two centuries ago, Congress "manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger* v. *Harris*, 401 U.S. 37, 43 (1971). The Anti-Injunction Act, first enacted in 1793 and now codified at 28 U.S.C. § 2283, prohibits federal courts from "grant[ing] an injunction to stay proceedings in a State court," subject to only a few exceptions. The Congress that enacted the Act was responding to the country's unique and recently-created system of federalism, which included a "dual court system" that "was bound to lead to conflicts and frictions." *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). As Justice Black explained, "to make the dual system work and to prevent needless friction between state and federal courts, it was necessary to work out lines of demarcation between the two systems." *Ibid.* (internal citation and quotation marks omitted).

The Anti-Injunction Act responded to that concern. Its prohibition on federal courts enjoining state proceedings "serve[s] to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States." *Taylor* v. *Carryl*, 61 U.S. 583, 595 (1857).

Supplementing the Anti-Injunction Act is the *Rooker-Feldman* doctrine, a principle derived by negative inference from 28 U.S.C. §§ 1257 and 1331 that bars federal district courts from "exercis[ing] appellate jurisdiction over state-court judgments.'" *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 544 U.S. 280, 292 (2005) (quoting *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3

(2002)). And 28 U.S.C. § 1738 operates similarly, by "requir[ing] federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982).

On top of those congressional policies, there has long been a "strong judicial policy," *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 600 (1975), against "federal court interference with state court proceedings." *Younger*, 401 U.S. at 43. In *Younger*, this Court held that even when the Anti-Injunction Act does not apply, principles of equitable jurisprudence and "a proper respect for state functions" require that federal courts stay their hands. *Id.* at 44. The Court explained that ours "is a system in which there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 44. As a consequence, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45.

The *Younger* doctrine matters most when neither the Anti-Injunction Act nor the *Rooker-Feldman* doctrine applies. Under present law, that most commonly occurs in two circumstances.

The first is when a party in a pending state proceeding files a federal action under 42 U.S.C. § 1983 to enjoin the state proceeding. In *Mitchum* v. *Foster*, 407 U.S. 225 (1972), the Court held that § 1983 is an

"expressly authorized" exception to the Anti-Injunction Act, but that the Court does "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id.* at 243.

The second circumstance is when the state proceeding the federal plaintiff seeks to enjoin is a state administrative proceeding. This Court has left open whether the Anti-Injunction Act applies to state administrative proceedings, see *Gibson* v. *Berryhill*, 411 U.S. 564, 573 n.12 (1973), but the lower courts that have addressed the issue have held it does not.[2]

The *Younger* doctrine ensures that, in these two settings, federal courts will maintain their tradition of not enjoining ongoing state judicial proceedings. Such abstention furthers the comity and federalism necessary to make our dual court system work. As the Court recently observed, "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona* v. *United States*, __ U.S. __, 132 S. Ct. 2492, 2500 (2012).

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[2] See, e.g., *SMA Life Assurance Co.* v. *Sanchez-Pica*, 960 F.2d 274 (1st Cir. 1992); *Kerr-McGee Chemical Corp.* v. *City of West Chicago*, 914 F.2d 820 (7th Cir. 1990); *Entergy* v. *Nebraska*, 210 F.3d 887 (8th Cir. 2000); and *U.S. Fidelity & Guaranty Co.* v. *Lee Investments LLC*, 641 F.3d 1126 (9th Cir. 2011).

Sprint ignores this history and instead insists that this case represents a routine application of the principle that federal courts have a "virtually unflagging obligation" to decide cases within their jurisdiction. See Pet. Br. 11, 14 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)). But a request that a federal court enjoin an ongoing state proceeding is anything but routine—and nothing in *Colorado River* suggests otherwise. To the contrary, *Colorado River* listed "three general categories" of cases that are "exception[s]" to the general rule that federal courts exercise their jurisdiction, and included cases subject to *Younger* abstention among the exceptions. 424 U.S. at 813, 814. "Where a [federal] case is properly within [the *Younger* line of cases], there is no discretion [for the federal court] to grant injunctive relief." *Id.* at 816 n.22.

In other words, there remain "some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.'" *NOPSI*, 491 U.S. at 359. And requests that federal courts enjoin ongoing state proceedings is one of those "classes of cases." Sprint asks this Court to carve out an entirely new category of state judicial proceedings of Sprint's own creation—so-called "remedial" proceedings—from that "normal" rule. Sprint's request conflicts with longstanding principles of judicial federalism.

II. Neither the principles underlying the *Younger* abstention doctrine nor this Court's decisions support allowing federal courts to enjoin "remedial" state proceedings.

The question presented asks whether federal courts should abstain under *Younger* when the state judicial proceeding can be characterized as "remedial." The answer is yes. There is nothing qualitatively different about a so-called "remedial" proceeding that distinguishes it from non-remedial proceedings. All of the comity and federalism interests *Younger* serves are implicated equally in the remedial context.

A. The *Younger* doctrine's purposes are served by applying the doctrine to federal actions that seek to enjoin "remedial" state proceedings.

The "'vital consideration'" justifying *Younger* abstention is "proper respect for the fundamental role of States in our federal system." *Ohio Civil Rights Comm'n* v. *Dayton Schools*, 477 U.S. 619, 626 (1986) (quoting *Younger*, 401 U.S. at 44)). Specifically, there are four "evils at which *Younger* is directed": (1) casting "aspersion on the capabilities and good faith" of the state judicial system; (2) "depriv[ing] the States of a function which quite legitimately is left to them," namely, "providing a forum competent to vindicate any constitutional objections interposed against" state policies; (3) preventing "duplicative legal proceedings"; and (4) "prevent[ing] the state . . . from effectuating its substantive policies." *Huffman*, 420 U.S. at 604, 608, 609.

Because those four considerations are "equally applicable . . . to civil proceedings in which important state interests are involved," *Dayton Schools*, 477 U.S. at 627, *Younger* applies not only to criminal proceedings, but to civil proceedings as well. *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 11 (1987); *Dayton Schools*, 477 U.S. at 627; *Trainor* v. *Hernandez*, 431 U.S. 434, 444 (1977); *Huffman*, 420 U.S. at 603–07. A state-court civil defendant who runs to federal court to ask that an ongoing state proceeding be enjoined necessarily casts "aspersion on the capabilities and good faith" of the state judicial system and necessarily deprives states the function of "providing a forum competent to vindicate any constitutional objections interposed against" state policies. If the federal court declines to abstain, it may also create "duplicative legal proceedings" and "prevent[] the state . . . from effectuating its substantive policies."

Although the first civil cases to which the Court applied *Younger* involved state-court civil-enforcement proceedings brought by state actors, *Huffman*, 420 U.S. at 604, the Court went on to apply *Younger* to purely private civil actions, *Pennzoil*, 481 U.S. at 13; *Juidice* v. *Vail*, 430 U.S. 327 (1977), and to state agency proceedings, *Dayton Schools*, 477 U.S. at 627–28; *Middlesex County Ethics Comm'n* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432–34 (1982). More generally, the Court has stated that *Younger* abstention is appropriate when there is "an ongoing state judicial proceeding"; "the proceedings implicate important state interests"; and "there [is] an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex County*, 457 U.S. at 432.

Just as the principles underlying *Younger* are "equally applicable . . . to civil proceedings in which important state interests are involved," *Dayton Schools*, 477 U.S. at 627, they are equally applicable to *remedial* civil proceedings in which important state interests are involved. This can be seen by looking at fact patterns where, under Sprint's proposed test, *Younger* would not apply in the state-agency context:

- A state handgun permit board receives evidence to help it determine whether an applicant meets the statutory standards for obtaining a permit to carry a handgun in public. While the hearing is pending, the applicant asks a federal court to enjoin the proceeding on the ground that the state law violates the Second Amendment.

- A state administrative law judge rules that a person is entitled to assisted-living-related Medicaid waiver services. The state appeals to the Director of the state HHS. While the Director is adjudicating the issue, the person files suit in federal court, asking that the state proceeding be enjoined because the denial of the waiver services would violate the Medicaid Act.

- An employee asserts before a state administrative law judge that her employer (a religiously affiliated college) discriminated against her in violation of state law. While the ALJ is adjudicating the issue, the employer files suit in federal court asking that the ALJ proceeding be enjoined because application of the state law to it violates the Free Exercise Clause.

Under Sprint's position, the federal courts should have unfettered discretion to enjoin each of these state proceedings. Yet every interest *Younger* seeks to advance is present in these remedial matters.

First, the federal actions casts "aspersion on the capabilities and good faith" of the state judicial systems because the federal actions are premised on the belief that the state administrative tribunal, or other state judicial tribunals on appeal, will be unable fairly and competently to address the constitutional objections to the proceedings.[3]

Second, the federal actions also necessarily deprive states the function of "providing a forum competent to vindicate any constitutional objections interposed against" state policies. As the first Justice Harlan put it: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them[.]" *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884); accord *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States[.]").

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[3] Of course, *Younger* does not apply if the "state proceedings" do not "afford an adequate opportunity to raise the constitutional claims." *Moore* v. *Sims*, 442 U.S. 415, 430 (1979). The *amici* states assume, for purposes of these hypotheticals, that the state proceedings do afford an adequate opportunity to raise the constitutional claims.

Third, in each of these examples, the federal action also creates "duplicative legal proceedings"; where there was one proceeding in which the plaintiff's claim and the defendant's constitutional defense could be addressed, there now are two.

Finally, the federal actions "prevent[ ] the state . . . from effectuating its substantive policies," namely, its policies regarding gun possession, Medicaid services, and discrimination.

The same is true when Sprint's rule is applied outside the agency context, to § 1983 suits filed to enjoin ongoing state-court proceedings. Examples include:

- A couple wishing to adopt a child files a petition in state court seeking the termination of the birth father's parental rights. While that action is pending, the father files a § 1983 action against the state-court judge arguing that the state parental-termination law violates due process and the Indian Child Welfare Act and asking that the state proceeding be enjoined.[4]

- A man has appeared regularly before a state court judge who oversaw the man's divorce proceeding and oversees disputes with respect to alimony payments and custody of his children. While the most recent custody dispute is pending, the man files a § 1983 action in federal court alleging that the judge's manner of

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[4] That was the basic fact pattern in *Morrow* v. *Winslow*, 94 F.3d 1386 (10th Cir. 1996). The court of appeals held that the district court should have abstained under *Younger*.

> conducting the cases violates his due process and equal protection rights. For relief, the man asks that the judge be enjoined from continuing to hear his alimony and custody disputes.[5]

Again, under Sprint's position, the *Younger* doctrine would not apply and the federal court would be cut loose to enjoin each of the state proceedings even though all four interests *Younger* seeks to advance are present. In each instance, a federal-court injunction would reflect negatively on the state judicial systems' ability to enforce federal rights; the state courts would be prevented from performing their role of vindicating constitutional objections to state actions; there would be duplicate federal and state proceedings; and states would be prevented from effectuating important state policies, such as domestic relations law and protecting the public fisc. Yet Sprint offers no explanation why *Younger*'s federalism and comity roots should be ripped out in the context of a remedial action.

When first applying *Younger* to civil proceedings, this Court stated that it "is significant for present purposes that the [Anti-Injunction Act] does not discriminate between civil and criminal proceedings pending in state courts." *Trainor*, 431 U.S. at 445 n.8. Nor does the Anti-Injunction Act distinguish between state proceedings that are "coercive" and those that are "remedial." The comity and federalism considerations

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[5] That was the basic fact pattern in *Mann* v. *Conlin*, 22 F.3d 100 (6th Cir. 1994). The court of appeals held that the district court should have abstained under *Younger*. The court of appeals' decisions in these two cases show that Sprint's contention that the other circuits widely disagree with the Eighth Circuit is overstated.

underlying the *Younger* doctrine provide no reason to depart from the Anti-Injunction Act in that respect either.

Glaringly absent from Sprint's submission is an extended discussion regarding how Sprint's coercive/remedial test advances the purposes of, or is consistent with, the principles underlying *Younger*. The closest Sprint comes is asserting that "[t]he central tenet underlying all of these *Younger* cases is" that federal courts should not "unduly interfere with a state's administration of its criminal and civil-enforcement mechanisms." Pet. Br. 23. But that just states a conclusion; it provides no reason for it.

Sprint also says that *Younger* is only a "narrow exception[ ]" to the general rule that federal courts must adjudicate cases within their jurisdiction; to remain a "narrow exception" it must have limits; and limiting *Younger* to state enforcement actions accomplishes that objective. See Pet. Br. 11, 27–28. But again, this argument fails to explain why remedial proceedings as a class deserve to be excluded categorically from the protections *Younger* abstention provides.[6]

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[6] Taking a different tack, *amici* Law Professors argue (Br. 10–22) that *Younger* abstention does not apply to a "completed" agency proceeding. By its nature, that limitation on *Younger* would apply whether or not the agency proceeding was coercive or remedial. It is therefore not "fairly included" within the question presented, which focuses entirely on that distinction. S. Ct. R. 14.1(a); Pet. for Writ of Cert. i. This case must therefore proceed on the same assumption the Court made in *NOPSI*, namely, that "litigation, from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no

At bottom, carving remedial state proceedings from the protection of the *Younger* doctrine is arbitrary and unprincipled. It would mean a federal court could not enjoin the most minor of state criminal prosecutions, yet is free to enjoin state civil proceedings that involve issues of fundamental importance to the sovereign state. It would mean a federal court cannot enjoin a state EEOC proceeding instituted by a state agency but may enjoin a state EEOC proceeding instituted by an employee—even though the impact on the state judicial tribunal is the same and both cases vindicate the state's anti-discrimination policy.

And under the Tenth Circuit's version of the coercive/remedial test, which Sprint embraces (Br. 29–30), it would mean *Younger*'s application depends on the fortuity of how a state first implements its policies. Under *Brown* v. *Day*, 555 F.3d 882, 889 (10th Cir. 1989), if a state agency initiates an administrative proceeding to, say, take away a person's professional license, the proceeding would be considered coercive and the *Younger* doctrine would apply.

But if the state agency took away the person's license through an *ex parte* action, prompting the person to institute an administrative proceeding, the proceeding would be considered remedial and the *Younger* doctrine would not apply. The *Younger* doctrine ought not rest on such thin distinctions.

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more permitted at the conclusion of the administrative stage than during it." 491 U.S. at 369.

This very case shows the flaws in Sprint's proposed rule. Under Sprint's approach, in the middle of the IUB's deliberations, Sprint could have asked a federal court to enjoin the proceeding because (in Sprint's view) the IUB lacked the authority to address how VoIP traffic is categorized under federal law. Not only would that have been deeply offensive to the state judicial system, it would have interfered with a state agency's oversight of an important regulatory matter. Labeling this case an "everyday commercial dispute[ ]" (Pet. Br. 26) does not make it so. The proper functioning of a state's telecommunications system, free from disconnection of services, is a vital state interest—and is no less so merely because Sprint had the title of "Complainant" in the state-agency proceeding.

The far better approach is for federal courts to look at the substance of the dispute to determine whether the state proceedings are "necessary for the vindication of important state policies." *Middlesex County*, 457 U.S. at 432. When the answer to that question is yes, as is the case here, federal courts should continue to faithfully apply *Younger*.

B. This Court's decisions do not support excluding "remedial" state-court proceedings from the *Younger* doctrine's protections.

As even Sprint must acknowledge, this Court has never held that "remedial" state proceedings are exempt from the *Younger* doctrine. To the contrary, the Court has adopted a standard for *Younger* abstention—whether there is "an ongoing state judicial proceeding";

"the proceedings implicate important state interests"; and "there [is] an adequate opportunity in the state proceedings to raise constitutional challenges," *Middlesex County*, 457 U.S. at 432—that by its terms encompasses remedial proceedings.

Moreover, as Sprint concedes, the Court has applied *Younger* abstention to civil cases that are not "civil enforcement proceedings." Pet. Br. 22. In *Pennzoil*, the Court held that a federal court erred when it enjoined a state court from applying a state procedural rule that requires a losing party in civil litigation to post a bond in the amount of the judgment to obtain a stay of judgment pending appeal. 481 U.S. at 10–14. Texaco specifically argued that *Younger* abstention was inappropriate because the case did not involve a state enforcement action. See Br. of Appellee at 26, 53, *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1 (1987) (No. 85-1798). The Court did not agree. Likewise, in *Juidice* v. *Vail*, 430 U.S. at 335, the Court applied *Younger* abstention where defendants in a collection action asked a federal court to enjoin the state court from employing statutory contempt procedures.

In each of these rulings, the Court emphasized that the state's interest in the proceedings is what matters most. "This concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interest in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11.

Sprint tries to cabin *Pennzoil* and *Juidice* by ascribing them to a narrow third category of cases to which *Younger* applies in addition to criminal- and civil-enforcement proceedings. Pet. Br. 22, 24–25 (quoting *NOPSI*'s statement that the Court has "expand[ed] the protection of *Younger* . . . to civil enforcement proceedings, and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," 491 U.S. at 368 (internal citations omitted)). Sprint reads too much into that passage. The *NOPSI* Court was merely describing the facts of its prior cases, not delineating the metes and bounds of *Younger* abstention.

Indeed, if that passage in *NOPSI* meant that *Younger* does not apply to remedial state proceedings, that would have been the end of the case, for the state administrative proceeding there was undeniably "remedial"—the New Orleans City Council was determining the rates NOPSI could charge, not prosecuting a case to punish NOPSI for an alleged bad act. 491 U.S. at 355.

Yet the Court did not resolve the case on that ground. Instead, the Court explained at length that *Younger* did not apply for an entirely different reason: because the doctrine covers only federal-court review of state *judicial* action, not state *legislative* action. *Id.* at 369–73. (Sprint cannot rely on that rule here because the lower courts held, correctly, that the IUB acted in a judicial capacity, and Sprint has not appealed that holding.)

Nor would it make sense to limit *Younger*'s "non-enforcement" scope to federal plaintiffs' efforts to evade compliance with state-court contempt orders, bond requirements, and other procedures a state court applies after it issues a judgment. Even when viewed just from the perspective of the state judiciary, contempt orders, bond requirements, and the like are hardly the most fundamental components of judicial authority. Would the Harris County District Court's authority been less undermined if, during the course of the underlying trial in *Pennzoil*, Texaco filed a § 1983 action in federal district court arguing that the state trial had been a kangaroo court in violation of due process? Surely not. The "state courts' ability to perform their judicial functions" is undermined whenever a state-court defendant chooses to assert a federal defense not in state court, but through a separate federal action brought to bring a halt to the ongoing state proceeding.

Sprint also points to the final sentence of footnote 2 of *Dayton Schools*, which distinguished *Patsy* v. *Florida Board of Regents*, 457 U.S. 496 (1982), by noting that "[u]nlike *Patsy*, the administrative proceedings here are coercive, rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest." 477 U.S. at 627 n.2. Of course, the basic difference between *Dayton Schools* and *Patsy* was that the federal plaintiff in *Patsy* never instituted a state proceeding in the first place. As this Court later clarified in *Ankenbrandt* v. *Richards*, 504 U.S. 689, 705 (1992), "we have never applied the notions of comity so critical to *Younger*'s 'Our Federalism' when no state proceeding was pending nor any assertion of important

state interests made." Footnote 2 of *Dayton Schools* merely provides details on the state administrative process that was present there.

As a result, the *most* that can be said of footnote 2 is that it is *dicta* regarding an issue the parties did not brief, for the applicability of *Younger* to remedial state actions was not before the Court. The Court is "not bound," however, "to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Community College* v. *Katz*, 546 U.S. 356, 363 (2006).

Instead of grappling with *Younger* and its underpinnings, Sprint devotes most of the first section of its Argument to *Verizon Maryland Inc.* v. *Public Service Comm'n of Maryland*, 535 U.S. 635 (2002), which it insists supports its proposed rule. Pet. Br. 14–18. That insistence is puzzling, given that the decision did not once mention the *Younger* doctrine. This Court has time and again admonished that it does not *sub silentio* decide issues it does not discuss in its opinions. See, *e.g.*, *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Verizon Maryland addressed and resolved "the question whether federal district courts have *jurisdiction* over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet Service Providers violates federal law." 535 U.S. at 638 (emphasis added). The Court did not resolve non-jurisdictional issues. To the contrary, the Court

expressly declined to reach the Maryland PSC's contention that the Telecommunications Act of 1996 did not create a private cause of action to challenge the commission's order. See *id.* at 642–43. The Court did not reach the applicability of the *Younger* doctrine, an issue none of the parties presented to the Court.

More substantively, *Verizon Maryland* involved a state utility commission acting under a delegation of federal authority, namely, reviewing and approving interconnection agreements that federal law mandated. Contrary to *amicus* CTIA's contention (Br. 33–35), that is not the case here. The Telecommunications Act of 1996 expressly leaves state utility commissions with their traditional jurisdiction over intrastate access fees. 47 U.S.C. § 152(b). The Act might or might not preempt the state commissions' exercise of that authority with respect to VoIP traffic; that is the merits question in this case. But that does not convert the IUB into (in CTIA's words, Br. 20) "deputized federal regulators" with respect to local access fees.[7]

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[7] *Amicus* CTIA also argues that *Verizon*'s holding that the *Ex parte Young* doctrine applies to actions against state utility board commissioners suggests that the *Younger* doctrine does not apply to proceedings before those commissioners. See CTIA Br. 14–16. It suggests no such thing. Many of this Court's cases upholding *Younger* abstention involved § 1983 actions brought under *Ex parte Young* against state officers. E.g., *Dayton Schools*, 477 U.S. at 621; *Trainor*, 431 U.S. at 438; *Moore*, 442 U.S. at 422. A state actor's amenability to an *Ex parte Young* action in no way militates against *Younger* abstention.

C. Applying the *Younger* doctrine to federal actions that seek to enjoin "remedial" state proceedings does not sweep too far.

Sprint insists its proposed rule is needed to ensure that *Younger* abstention does not apply "with respect to *every* state-agency proceeding" and does not swallow up parallel litigation that arises from "everyday commercial disputes." Pet. Br. 26, 27. Neither risk exists. As an initial matter, the *Younger* doctrine contains its own exceptions. The doctrine does not apply to bad-faith prosecutions, *Younger*, 401 U.S. at 54; when the state statute is "flagrantly and patently" unconstitutional, *id.* at 53; and where the state court is "incapable of fairly and fully adjudicating the federal issues before it." *Moore*, 442 U.S. at 433 (quoting *Kugler* v. *Helfant*, 421 U.S. 117, 124–25 (1975)).

Beyond that, *Younger* does not apply to state-agency actions that are legislative, not adjudicative, in nature. *NOPSI*, 491 U.S. at 370. That limitation sweeps broadly, covering a large percentage of the work state agencies perform and the orders they issue. (E.g., environmental agencies that pass rules restricting development; housing or labor agencies that set health-and-safety standards; and revenue departments that pass rules affecting tax liability).

In addition, Congress often provides expressly for federal-court review of specific final state agency actions. One example is the provision addressed in *Verizon Maryland*, 47 U.S.C. § 252(e)(6), which provides that "[i]n any case in which a State commission makes a determination under this section [regarding the formation and approval of

interconnection agreements], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." A provision of that sort overrides the *Younger* doctrine by expressly authorizing federal-court interference with the ongoing state proceeding.[8]

Other examples appear in the Individuals with Disabilities in Education Act, 20 U.S.C. § 1415(i)(2)(A) (authorizing federal-court review of "impartial due process" hearing conducted by state or local education agency); the Rehabilitation Act. 29 U.S.C. § 722(c)(5)(J) (authorizing federal-court review of state impartial hearing officer's decision regarding vocational rehabilitation programs); and still another provision of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(v) (authorizing federal-court review of state zoning board rulings regarding the placement of wireless facilities). In addition, the Clean Water Act and Clean Air Act authorize persons aggrieved by state agency actions to file citizen suits in federal court. 33 U.S.C. § 1365; 42 U.S.C. § 7604. Some or all of these

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[8] That limitation on *Younger*'s application to final state agency actions explains many of the examples *amicus* CTIA provided (Br. 16–17) where federal courts reviewed state agency actions. E.g., *Talk America* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011) (addressing dispute over state agency determination regarding formation of interconnection agreement); *BellSouth Telecomms., Inc.* v. *Kentucky Pub. Serv. Comm'n*, 669 F.3d 704 (6th Cir. 2012) (same); *Illinois Bell Tel. Co.* v. *Box*, 548 F.3d 607 (7th Cir. 2008) (same); *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*. 461 F. Supp. 2d 1055 (E.D. Mo. 2006) (same).

federal statutory provisions, and others like them, may also override the *Younger* doctrine.

Nor is Sprint correct in asserting (Br. 26) that applying *Younger* abstention here is tantamount to applying it "to state-court proceedings involving adjudication of everyday commercial disputes." First, as discussed earlier, this case cannot accurately be called an "everyday commercial dispute." Second, "everyday commercial disputes" among private parties do not raise *Younger* issues. This reality can be seen by looking at a paradigmatic example of "parallel state and federal litigation," the dispute in *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 544 U.S. at 202.

In *Exxon Mobil*, two parties to a joint venture disagreed about royalty charges due under their agreement. One of them filed suit in state court "seeking a declaratory judgment that the royalty charges were proper under the joint venture agreements." *Id.* at 289. The other party countersued in federal district court, alleging that the charges were too high.[9] The *Younger* doctrine had no bearing on the case. Indeed, because the federal suit was not a § 1983 action, the Anti-Injunction Act, not *Younger*, would control whether the federal court, if asked, could have enjoined the state proceeding. That will typically be the case with respect to "everyday commercial disputes." In sum, excluding "remedial" cases from

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[9] Federal jurisdiction existed under 28 U.S.C. § 1330 because the federal defendant was considered a foreign state. Diversity jurisdiction is the more common basis for federal subject-matter jurisdiction in commercial cases, though some disputes raise issues that arise under federal law.

Younger's rubric is not necessary to keep the doctrine properly confined.

Sprint's proposed coercive/remedial rule also undermines the balance this Court reached in *Mitchum* v. *Foster*. As noted above, *Mitchum* held that "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding"—*i.e.*, the *Younger* doctrine—fully apply to § 1983 actions. 407 U.S. at 243. *Mitchum* thereby found a balance between rigid application of the Anti-Injunction Act on the one hand, and giving federal courts free reign to enjoin state proceedings on the other.

Mitchum obtained that balance because the *Younger* doctrine contains critical exceptions (bad-faith prosecutions, flagrantly unconstitutional state law, etc.) that Professor Tribe notes "cover the very circumstances that were believed by the authors of the Civil Rights Act to require a federal judicial remedy that would not only operate independent *of* the state courts, but also *against* those courts." Br. for Appellant 49 n.10, *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1 (1987) (No. 85-1798).

Sprint's proposed rule upsets that balance and the policies underlying *Mitchum* and § 1983. *Mitchum* inferred that Congress excepted § 1983 from the Anti-Injunction Act because § 1983 protects federal rights against infringement by state actors. 407 U.S. at 240–42. That risk is at its highest when a state acts coercively, and is at its nadir in a remedial proceeding that might not even involve a state party. Applying *Younger* only to the former makes no sense.

III. *Younger* abstention, not *Burford* abstention, applies to this case.

In classic "heads I win, tails you lose" fashion, Sprint and its *amici* assert that (1) the only relevant abstention doctrine is *Burford* abstention, but (2) *Burford* abstention is not warranted here. Pet. Br. 32–35; Law Profs. Br. 27–33. The latter contention is correct; the former is not.

As explained in § I, *supra*, the *Younger* doctrine embodies the longstanding judicial policy against federal "interference with a state judicial proceeding." *Huffman*, 420 U.S. at 604. Based on equity, comity, and federalism principles, *Younger* decreed that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 45. By asking a federal district court to enjoin a proceeding pending in a state judicial tribunal, Sprint squarely implicated *Younger*.

Iowa did not assert *Burford* abstention, and Sprint's suggestion that the Eighth Circuit "confused" the doctrines is mistaken. *Burford* requires federal courts to abstain from interfering with state agency orders or proceedings—whether they are legislative or adjudicatory in nature—"when there are 'difficult questions of state law bearing on policy problems of substantial public import'" or where federal review would disrupt "'state efforts to establish a coherent policy with respect to'" important matters. *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814).

Iowa has not argued that Sprint's facial preemption challenge to the IUB's order implicates difficult questions of state law or threatens to disrupt the state regulatory scheme. Cf. *id.* at 362–63 (holding that *Burford* abstention did not apply to utility's facial preemption challenge to a retail rate order, where the federal claim called for "no inquiry beyond the four corners of the . . . order" and thus "would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity"). Given this context, the Eighth Circuit correctly looked to *Younger* and *Younger*'s concern with federal disruption of state judicial proceedings.

Sprint essentially contends that, because *Burford* abstention applies in some cases involving state regulatory proceedings, *Burford* is the only doctrine potentially relevant here. This Court has not adopted such a cramped view of abstention doctrines. Indeed, *NOPSI* itself is inconsistent with Sprint's position. In *NOPSI*, this Court carefully considered the potential relevance of both *Younger* and *Burford* before deciding that neither doctrine required the district court to abstain from deciding the regulated utility's preemption claim.

Sprint also argues repeatedly that the *Younger* doctrine is inapposite because the dispute centers on a contested issue of *federal* law. See Pet. Br. 2, 11, 14. But *NOPSI* made clear that the *Younger* doctrine reaches cases where the federal plaintiff argues that federal law preempts state law. 491 U.S. at 364–66 (rejecting NOPSI's contention "that *Younger* does not require abstention in the face of a substantial claim that the challenged state action is completely pre-

empted by federal law"). Just as "the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction," neither do "pre-emption-based challenges." *Id.* at 365.

Indeed, every decision by this Court holding that a federal court should have abstained under *Younger* involved the assertion in federal court of a federal constitutional objection to a state law or state proceeding. E.g., *Pennzoil*, 481 U.S. at 6 & n.6 (Due Process and Equal Protection Clause objection to state-court procedure); *Dayton Schools*, 477 U.S. at 621 (Free Exercise and Establishment Clause challenge to application of employment discrimination law); *Huffman*, 420 U.S. at 598–99 (Free Speech Clause challenge to state public nuisance statute).

Younger establishes that state judicial tribunals are capable of resolving federal issues and should be allowed to do so without federal interference. Sprint's view that the *Younger* doctrine is designed to safeguard state courts' ability to resolve state-law issues, and has little bearing on cases involving federal issues, has it exactly backwards.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-815

IN THE
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, LP
Petitioner,

v.

ELIZABETH S. JACOBS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Broad Framework Articulated In *Middlesex* Allows Courts to Balance Various "Vital" Factors, And That Framework Should Not Be Sharply Limited	6
A. *Middlesex* Advances the Principles Upon Which *Younger* Abstention Was Built	6
B. The Middlesex Balancing Approach Is Self-Limiting And Does Not Result in Automatic Abstention In All Civil Proceedings	8
II. Focusing the *Younger* Analysis On The Coercive-Remedial Test Would Undermine the Doctrine's Fundamental Purpose	11
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page(s)

Brown v. Day,
555 F.3d 882 (5th Cir. 2009)..... 11

Devlin v. Kalm,
594 F.3d 893 (6th Cir. 2010)..... 11

Huffman v. Pursue Ltd.,
420 U.S. 592 (1975)..... 5, 9, 12, 13, 14

Juidice v. Vail,
430 U.S. 327 (1977)..... 5, 6, 10, 16

Kercado-Melendez v. Aponte-Roque,
829 F.2d 255 (1st Cir. 1987) 11

Majors v. Engelbrecht,
149 F.3d 709 (7th Cir. 1998)..... 11

Middlesex County Ethics Committee v. Garden State Bar Ass'n,
457 U.S. 423 (1982).....*passim*

Moore v. Sims,
442 U.S. 415 (1979)..... 11

New Orleans Public Service, Inc. v. Council of City of New Orleans,
491 U.S. 350 (1989)..... 6, 8, 9, 15

O'Neill v. Philadelphia,
32 F.3d 785 (3d Cir. 1994) 11

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.,
477 U.S. 619 (1986)..... 8, 11, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Pennzoil Co. v. Texaco, Inc.,
481 U.S. 1 (1987) 6, 10, 12

Prentis v. Atlantic Coast Line Co.,
211 U.S. 210 (1908) 9

Younger v. Harris,
401 U.S. 37 (1971) ..... *passim*

STATUTES

28 U.S.C. § 1257 5

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INTEREST OF *AMICI CURIAE* [1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its

[1] This brief was not written in whole or in part by counsel for any party, and no such counsel or party made a monetary contribution to fund the preparation or submission of this brief. This brief is filed under the blanket consent granted by the parties under Supreme Court Rule 37.3.

commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its 3,000-plus members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

Comity and cooperative federalism are the heart of the *Younger* abstention doctrine. As explained in *Younger*, "a proper respect for state functions," is the "vital consideration." *Younger v. Harris*, 401 U.S. 37, 44 (1971). "Vital" because states and their institutions perform separate and important functions distinct from those performed by the federal government. The Eighth Circuit understood that "vital" consideration, and properly concluded that "[i]nterests of comity and federalism support federal abstention where state

judicial review of the [Iowa Utilities Board's] order has not yet been completed." Pet. App. 6a. This Court should uphold that decision.

Younger abstention recognizes the distinct functions and roles played by the state and federal government, and calls for "sensitivity to the legitimate interests" of each actor in the federal system. *Younger*, 401 U.S. at 44. This case presents a situation warranting that kind of sensitivity to the legitimate state interests of the State of Iowa and the Iowa Utilities Board ("IUB"). The IUB, like other state and local governments, has the right to enforce state laws and regulations in state courts and administrative proceedings. As the Eighth Circuit recognized, active state legal proceedings should not be unduly interrupted by the federal courts or forum-shopping litigants. Instead, federal courts considering whether to become embroiled in ongoing state litigation should exercise the caution and sensitivity that are the hallmarks of the *Younger* abstention doctrine. As stated in *Younger*, in our federal system, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44.

In order to avoid unduly interfering with legitimate state functions, the Eighth Circuit properly considered the factors this Court outlined in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). In *Middlesex*, this Court set forth an approach to *Younger* abstention that considered several important factors and balanced the needs and interests of the parties while accounting for the

importance of cooperative federalism. Under the *Middlesex* approach, *Younger* abstention is appropriate when (1) there is an ongoing state judicial proceeding that (2) implicates important state interests, and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. *Id.* at 432. The Eighth Circuit considered those factors without placing undue emphasis on any one factor or narrow subset of factors. The Eighth Circuit did not focus exclusively or heavily on whether Sprint's action was "coercive" or "remedial," as Sprint urges this Court to do. Pet. App. 6a-7a.

Despite Sprint's concerns, and those articulated by *amicus* Chamber of Commerce, *Middlesex* is not an overly-broad framework in need of refinement through a bright-line test centered on the dichotomy between "coercive" and "remedial" actions. Under the existing *Middlesex* framework there is no danger that abstention will become the rule in every case involving a state administrative proceeding. A bright-line test focused narrowly on distinguishing between "coercive" and "remedial" state action, however, would pose a danger; it would cast aside the delicate balancing act required by *Younger* and replace it with an "analysis" centered primarily on the identity of the party that initiated the state proceeding. Abstention should not be automatically foreclosed based solely on information set forth on a caption page. While state interests might peak when state or local governments initiate criminal or civil enforcement proceedings, important interests may be implicated outside those contexts.

In other words, as this Court has recognized, a state's legitimate interests may extend beyond criminal and

civil enforcement proceedings. Indeed, this Court's past decisions applying *Younger* deliberately avoided narrowing *Younger* to only those cases brought by states in the enforcement context. The Court recognized as much in holding that "the principles of *Younger* and *Huffman* are not confined solely to the types of state actions which were sought to be enjoined in those cases." *Juidice v. Vail*, 430 U.S. 327, 334 (1977).

Like Iowa, all state and local governments have a legitimate interest in ensuring that proceedings initiated before state agencies, and in state courts, remain in the state's domain until finally resolved. The integrity of the judicial process requires that federal courts not interfere prematurely in a way that undermines the capability of state tribunals to resolve issues that directly impact the state's government, residents, economy, businesses, resources, and environment. There is time enough for federal review when the state proceedings are fully complete. 28 U.S.C. § 1257.

The integrity of the judicial process also requires that states, local governments, and federal court judges, have a clear understanding of when it is appropriate for federal courts to become embroiled in, or enjoin, ongoing state proceedings. The coercive-remedial test, as interpreted by Sprint, will not provide that clarity. Instead, it will increase the likelihood that ongoing state proceedings, concerning matters of great import to states but considered "remedial" by forum-shopping parties like Sprint, will be interrupted and undermined before they run their course. That approach hardly furthers the notion of comity.

This Court should not adopt Sprint's rigid bright-line test, which undermines respect for the integrity of ongoing state proceedings. Instead, this Court should make clear that the coercive-remedial distinction is merely a small part of the larger framework developed in *Middlesex*, and that the "remedial" label is not the end of a *Younger* inquiry.

ARGUMENT

I. The Broad Framework Articulated In *Middlesex* Allows Courts to Balance Various "Vital" Factors, And That Framework Should Not Be Sharply Limited

A. *Middlesex* Advances the Principles Upon Which *Younger* Abstention Was Built

A state's "interest" in adjudicating a matter is, like comity, at the very core of the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37, 44 (1971); *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364-65 (1989) (*NOPSI*); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-11 (1987). "Comity" is required because our nation is made up of separate state governments, and the federal government fares best when "States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. This concept, branded "Our Federalism," requires analysis and understanding of state "interest" as a precondition to balancing the interests of the state against the interests of the federal government, as the concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . ." *Id.*

To honor the spirit of comity and federalism that *Younger* abstention is built upon, any test crafted to guide the *Younger* analysis must grant federal courts the flexibility to properly examine the state's legitimate interests and activities. It must also balance those interests and activities against the interests of the federal government and federal courts.

Middlesex already provides the required flexibility while limiting the *Younger* abstention doctrine's application to those cases that further *Younger*'s fundamental principles. *Middlesex* set forth three conditions, or factors, that must be satisfied for *Younger* abstention to apply. Abstention is appropriate if (1) there is an ongoing state judicial proceeding, (2) that implicates important state interests, and (3) that provides an adequate opportunity to raise constitutional challenges. *Middlesex*, 457 U.S. at 432. If those conditions are met, federal courts should abstain from interfering with ongoing state proceedings "so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate . . . ." *Id.* at 435. In other words, *Middlesex* provided guidance. It also gave courts wide latitude to weigh the strength of a state's interests, and balance those interests with federal interests and concerns as diverse as bad faith and the presence of constitutional challenges. Bright-line rules are a poor substitute for that type of inquiry, and do not allow for the flexibility and judicial discretion required to truly consider whether *Younger* abstention is appropriate.

B. The Middlesex Balancing Approach Is Self-Limiting And Does Not Result in Automatic Abstention In All Civil Proceedings

Contrary to what Sprint and the Chamber of Commerce suggest, the *Middlesex* framework is not so expansive as to swallow all limitations this Court has imposed on the application of *Younger* abstention. As expressed in its *amicus* brief in support of Sprint, the Chamber fears that "[i]f *Younger* required federal courts to abstain during the pendency of both coercive *and* remedial state proceedings, there would be few (if any) state proceedings to which *Younger* did not apply." Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at 12. Sprint expressed a similar concern, arguing that the Eighth Circuit's approach to the *Younger* standard "would presumably be satisfied with respect to *every* state-agency proceeding" particularly given the availability of appeals and the broad interpretation of relevant "state interests." Brief for the Petitioner at 27. These concerns regarding the over-expansion of *Younger* abstention are unfounded.

Younger abstention applies only to proceedings that are truly judicial in nature. Several years after rendering its opinion in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (*Dayton Schools*), the first and only time this Court mentioned the coercive-remedial dichotomy, the Court specifically examined the types of proceedings that merit *Younger* abstention. *NOPSI*, 491 U.S. at 367-72. That inquiry did not, however, entail hard and fast rules distinguishing remedial proceedings from

coercive ones. In fact, *NOPSI* made no mention of remedial or coercive proceedings. Rather, the Court emphasized that only judicial proceedings are subject to *Younger* abstention.

That is, *Younger* is limited to those proceedings in which "'[a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'" *NOPSI*, 491 U.S. at 370, quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). And even among judicial proceedings, "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *NOPSI*, 491 U.S. at 368. Therefore, application of the *Middlesex* framework would not result in the application of *Younger* abstention to all state agency proceedings. Legislative and executive proceedings, and even judicial proceedings reviewing legislative and executive actions, would not be subject to *Younger* abstention.

Focusing the *Younger* inquiry on the character of the proceeding, rather than on the character of the initiating party, accords proper respect to the states, addressing *Younger's* concerns about comity without over-expanding its reach. This Court has recognized that federal judicial interference "prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman v. Pursue Ltd.*, 420 U.S. 592, 604 (1975).

Younger abstention is, in fact, already limited to proceedings in which the state has an important and legitimate interest. This Court's careful extension of the doctrine into the civil context is a testament to the need for judicial discretion in determining whether a state interest is important enough to warrant abstention. This Court demonstrated as much when it considered whether a state's interest in the contempt process was sufficiently important to merit *Younger* abstention. *Juidice*, 430 U.S. at 333-36. This Court found that the state's interest in pursuing a contempt charge was sufficiently important to warrant abstention, even though it recognized that the interest was perhaps not as important as the state's interest in enforcement of its criminal laws. *Id.* at 335. A bright-line rule limiting *Younger*'s application to coercive proceedings would essentially foreclose that type of analysis and would predetermine whether certain classes, or types, of cases warranted abstention. *Younger* abstention could be appropriate in any case where "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11. A bright-line rule would sharply limit the inquiry and analysis required to weigh a state interest, and would be unnecessary because of the limits this Court already placed on *Younger* in its decision in *Middlesex*.

Younger abstention is already limited by the substance of an action. For example, abstention is not appropriate unless a federal plaintiff has an adequate opportunity to raise constitutional challenges in the state tribunal. *See Middlesex*, 457 U.S. at 432 ("Where vital state interests are involved, a federal court

should abstain 'unless state law clearly bars the interposition of the constitutional claims.'"), quoting *Moore v. Sims*, 442 U.S. 415, 426 (1979). If a state or federal statute forecloses the state tribunal's consideration of constitutional issues, or commands that such issues be addressed in federal court, federal court abstention under *Younger* would not apply.

II. Focusing the *Younger* Analysis On The Coercive-Remedial Test Would Undermine the Doctrine's Fundamental Purpose

Taking their cue from a single footnote in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), courts have permitted the coercive-remedial distinction to dictate the outcome of the *Younger* abstention analysis. The Tenth Circuit, for example, has deemed the coercive-remedial dichotomy to be "the touchstone for determining whether the administrative proceeding is the type of proceeding that merits *Younger* abstention." *Brown v. Day*, 555 F.3d 882, 889 n.5 (5th Cir. 2009). *See also Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir. 2010) (*Younger* does not apply where the federal plaintiff is also a plaintiff in the state action); *Majors v. Engelbrecht*, 149 F.3d 709, 712 (7th Cir. 1998) (administrative proceedings are "judicial in nature" when they are coercive); *O'Neill v. Philadelphia*, 32 F.3d 785, 791 (3d Cir. 1994) (*Younger* abstention applies where a coercive proceeding has been initiated by the state in a state forum); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 260-61 (1st Cir. 1987) (administrative proceeding at issue was remedial rather than coercive, unlike in *Dayton Schools*). The Court in *Dayton Schools*, however, did not declare, much less hold, that *Younger*

abstention applies only to coercive proceedings. The Court did not expand on what it meant by "coercive" or "remedial" and did not elaborate on the significance of the distinction.

The Eighth Circuit's approach, which does not deem the coercive-remedial distinction to be outcome-determinative, properly retains the flexibility courts need to determine whether abstention is appropriate within the confines of the *Middlesex* framework. As this Court has said, even "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil*, 481 U.S. at 12 n.9. Accordingly, application of *Younger* abstention should not hinge on whether a state proceeding is characterized as remedial or coercive, particularly when that characterization depends entirely upon the identity of the party that initiated the proceeding.

Nor should *Younger* abstention hinge on the clever pleading and litigation strategies of large "regulated entities" that claim to "frequently find it necessary to police the line between federal and state authority to which they are subject . . . ." Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at 4. It is not the tactics of the parties that should dictate abstention determinations but the delicate balance between state and federal interests. Comity is of particular import when a party seeks federal court intervention to effectively annul the results of a state proceeding. *See Huffman*, 420 U.S. 592, 608-09. Such intervention casts "a direct aspersion on the capabilities and good faith

of state appellate courts[,]" and causes "a disruption of the State's efforts to protect interests which it deems important." *Id.* at 608.

It is comity that requires in this case that Iowa be allowed to complete the administrative and judicial proceedings already underway in the state, irrespective of whether Sprint's proceeding is labeled coercive or remedial. Upon unilaterally determining that Windstream, which provides services in Iowa, was not entitled to charge Sprint *intrastate access* charges for connecting certain VoIP calls to local Windstream customers, Sprint sought an order from the IUB, a *state agency*, to prevent Windstream from refusing to make those connections if Sprint did not pay the disputed charges. Sprint did not, however, obtain the result it was hoping for, and subsequently filed two actions challenging the IUB's determination, one in federal district court and one in state court.

Although the Eighth Circuit recognized that Sprint had a right to challenge the IUB's order in federal court, Sprint deliberately also initiated an action in state court, and "once a party initiates state 'judicial' proceedings in which the state has an important interest, the party must follow the proceedings through to the end." Pet. App. 4a. The Eighth Circuit noted that Sprint's state court proceeding had a bearing on the abstention analysis and concluded: "Interests of comity and federalism support federal abstention where state judicial review of the IUB's order has not yet been completed." Pet. App. 6a. As the court further concluded, the interests of comity and federalism would be thwarted should the federal court intervene to declare "how a state utilities board

should interpret its state's laws and regulations . . . ." Pet. App. 6a.

By seeking to effectively annul the outcome of the IUB proceeding in federal court, Sprint undermined the capability of the Iowa state court to review the challenged IUB decision. Where a state proceeding is initiated by someone who later, dissatisfied with the result, seeks to annul the state's decision in federal court, the rule espoused in *Huffman* should apply. "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." *Huffman*, 420 U.S. at 609.[2]

States and local government entities have an interest in ensuring that proceedings initiated locally remain local pending final resolution. Federal court interference with pending state judicial proceedings would undermine the capability of state tribunals to decide important issues that directly affect a state, its residents, businesses, economy, resources, and environment. State courts are oftentimes more accessible and have specialized knowledge of local laws and issues affecting surrounding communities. As such, in many instances, state courts may be better equipped to handle proceedings that implicate local interests and concerns, like the public safety impact caused by disruption of utilities services.

Important state interests cannot be evaluated by looking only to the status of the party that initiated

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[2] *Huffman* addressed "the deference to be accorded state proceedings which *have already been initiated* and which afford a competent tribunal for the resolution of federal issues." *Huffman*, 420 U.S. at 609 n.21 (emphasis added).

the suit. When considering a state's substantial interest, the focus should be on the "importance of the generic proceedings to the state[,]" not on the outcome of the particular case at bar. *NOPSI*, 491 U.S. at 365. In *NOPSI*, for example, the inquiry was not whether Louisiana had a substantial interest in reducing *NOPSI's* retail rate, but whether it had a substantial, legitimate interest in regulating local electric rates. *Id.* at 365. In *Dayton Schools*, the Court did not emphasize Ohio's specific concern with the firing of a teacher, but looked instead to the state's general interest in "the elimination of prohibited sex discrimination . . . ." *Dayton Schools*, 477 U.S. at 628. And in *Younger*, the Court did not focus on California's interest in prohibiting one person from distributing handbills, but rather considered the state's interest in enforcing its criminal laws. *Younger*, 401 U.S. at 51-52. These important state interests would be present regardless of whether the government or a private party initiated the state proceeding. Placing undue emphasis on the identity of the initiating party, without considering the strength of the state's interests, undermines the purposes of *Younger* abstention.

Focusing the *Younger* abstention inquiry on whether the proceeding is coercive or remedial would erode the doctrine's application to civil proceedings and limit the definition of an "important state interest." This Court has declared: "The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex*, 457 U.S. at 432. Moreover, "whether the proceeding 'is labeled civil, quasi-criminal, or criminal in nature,' the salient fact is whether federal-court interference would unduly interfere with the

legitimate activities of the state." *Id.* at 434 n.12, quoting *Juidice*, 430 U.S. at 335-36. If *Younger* abstention applied only to coercive proceedings, encompassing mainly proceedings initiated by the government to enforce state law, then the protected state interests would almost always be confined to those contexts, in disregard of the "salient fact" expressed above, that is, whether federal interference would disrupt the state's legitimate activities.

* * *

The approach Sprint advocates will increase forum shopping by plaintiffs who, unhappy with the preliminary results of their state-court action, will be free to seek relief in the federal courts while that action is still pending. The coercive-remedial distinction is not, standing alone, a good approximation of a state's interest in a particular matter. Each case deserves a full examination of the type provided for in *Middlesex*, and that examination should not be so limited that federal courts are required to step on the toes of their state counterparts without weighing all relevant factors. This Court should not replace the *Middlesex* framework with a test limiting a federal court's examination of state interest to reading the party titles on the caption page of a complaint.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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